(8)

No. 89-163-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Guadalupe Montalvo-Murillo

Docketed:
July 28, 1989

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Panetta II,Bernard J.

Entry	Date	Note	Proceedings and Orders
1	Jul 28 1989	G	Petition for writ of certiorari filed.
2	Aug 30 1989		DISTRIBUTED. September 25, 1989
3	Sep 1 1989	X	Brief of respondent Guadalupe Montalvo-Murillo in opposition filed.
4	Sep 21 1989	X	Reply brief of petitioner United States filed.
5	Oct 2 1989		Petition GRANTED.
			**********
6	Oct 19 1989		Record filed.
		*	Certified copy of C. A. Proceedings received.
7	Nov 15 1989		Joint appendix filed.
8	Nov 16 1989		Brief of petitioner United States filed.
9	Nov 27 1989		SETS FOR ARGUMENT TUESDAY, JANUARY 9, 1990. (4TH CASE)
10	Dec 5 1989		CIRCULATED.
11	Dec 19 1989	X	Brief of respondent Guadalupe Montalvo-Murillo filed.
12	Jan 2 1990	X	Reply brief of petitioner United States filed.
13	Jan 5 1990		Record filed.
		*	Certified copy of original record received.
14	Jan 9 1990		ARGUED.

89-163

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a failure to observe the "first appearance" requirement of the Bail Reform Act, 18 U.S.C. 3142(f) (Supp. V 1987), requires the release of a person who would otherwise be subject to pretrial detention.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-15a) is reported at 876 F.2d 826. The district court opinion (App., *infra,* 16a-31a) is reported at 713 F. Supp. 1407.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 32a) was entered on May 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 3142(f) of the Bail Reform Act of 1984, 18 U.S.C. 3142(f) (Supp. V 1987), provides in pertinent part:

(f) *Detention Hearing*. The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

* * * * *

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the Government may not exceed three days. * * *

STATEMENT

The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, provides that a person charged with an offense shall be detained prior to trial if "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(e) (Supp. V 1987). The Act further provides that the government or the judicial officer may initiate detention proceedings and that a detention hearing "shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance." 18 U.S.C. 3142(f) (Supp. V 1987). In this case, the district court found that no release conditions would assure respondent's appearance at trial or ensure that he would not pose a danger to the community. Nonetheless, the district court and the court of appeals both concluded that respondent was entitled to pretrial release because there had been a failure

to observe the "first appearance" provision of the Bail Reform Act.

1. On Wednesday, February 8, 1989, at approximately 3:30 a.m., United States Customs Service agents stopped respondent at a highway checkpoint north of Orogrande, New Mexico, near the Mexican border. The agents questioned respondent, who was the lone passenger in a pickup truck, concerning his citizenship. Respondent produced papers showing that he was a Mexican citizen legally residing in the United States. The agents then examined respondent's truck. They noted that it had been mounted with an auxiliary gas tank but that the tank was not connected to the engine. Upon further examination, they found that the tank had been fitted with a concealed door. Opening that door, the agents discovered approximately 72 pounds of cocaine, which had a wholesale value of almost $1 million. The agents also found $6,500 in U.S. currency concealed in the passenger section of the truck. App., *infra*, 4a, 17a, 21a, 23a; Feb. 23, 1989, Tr. 73-77.

The agents transported respondent to the Customs Service's local office, where they read respondent his rights and explained them to him. Respondent stated that he had intended to deliver the cocaine to purchasers in Chicago, Illinois, and he agreed to cooperate with the Drug Enforcement Administration (DEA) by making a "controlled delivery" of the cocaine under government surveillance. Later that day, several DEA agents escorted respondent by air carrier to Chicago, while another agent drove respondent's pickup truck to that destination. The agents parked the truck at a location in Chicago designated by respondent, but the anticipated purchasers failed to appear to complete the transaction. Meanwhile, on Friday, February 10, 1989, the government filed a criminal complaint in the United States District Court for the District of New Mexico charging respondent with possession of cocaine with

intent to distribute it, in violation of 21 U.S.C. 841. App., *infra,* 5a, 17a-18a; Feb. 23, 1989, Tr. 81-82.

2. Arrangements were then made to transfer respondent back to New Mexico. A magistrate in the District of New Mexico issued a warrant for respondent's arrest, and respondent was then taken before a magistrate in the Northern District of Illinois for a transfer hearing pursuant to Fed. R. Crim. P. 40. The magistrate in Illinois advised respondent, who was represented by a public defender, that he faced criminal charges in New Mexico. A local Assistant United States Attorney then explained that "the government was going to move for detention." Feb. 10, 1989, Tr. 4. After consulting with respondent's counsel, however, the Assistant United States Attorney said that the parties had agreed that if respondent were returned immediately to New Mexico, "we would not hold the detention hearing here and they would waive their right at this point and, however, not waive any rights to preliminary hearings or detention hearings in that district." *Id.* at 4-5. The magistrate asked whether respondent consented to the agreement, and he replied through an interpreter, "Yes. They want me to, I am with them." *Id.* at 7. The magistrate indicated that he would "enter an order of removal specifically reserving the issues of * * * detention and probable cause for determination by the District Court in New Mexico." *Id.* at 7-8. Respondent was returned to New Mexico that evening, Friday, February 10, and placed in the custody of local officials. App., *infra,* 5a-6a, 18a-19a.

3. On Monday morning, February 13, 1989, the DEA asked the New Mexico magistrate's office to arrange for respondent's detention hearing. The magistrate's office scheduled the hearing for Thursday, February 16. At the February 16th hearing, the magistrate described the charges against respondent, who was represented by re-

tained counsel, and read him his rights. The magistrate then verified that the Pretrial Services Office had not yet prepared a report on respondent. The magistrate stated:

> All right. I think, therefore, in the interest of judgment [*sic,* justice], that I should continue the detention hearing for a maximum of three working days, as the United States wishes to request. The detention and motion for detention will need to be filed. Otherwise, I will review the conditions of release and consider those within three working days.

Feb. 16, 1989, Tr. 5.[1] After observing that Monday, February 20, was a federal holday, the magistrate rescheduled the hearing for Tuesday, February 21. *Id.* at 5-6. The government filed a formal motion for detention on February 17, and the magistrate held the detention hearing, as scheduled, on February 21. At the conclusion of the hearing, the magistrate decided to release respondent upon the posting of a $50,000 bond and compliance with other conditions and restrictions. App., *infra,* 6a-8a, 19a-20a; Feb. 21, 1989, Tr. 1-21.

---

[1] Although the magistrate's statement suggests that the United States desired a continuance, the district court concluded that neither the government nor respondent formally moved for a continuance and that they apparently were prepared to proceed with the detention hearing on February 16. See App., *infra,* 19a. Respondent's counsel (who, like the government attorney, had not been present at the Illinois proceeding) did not specifically object to the continuance, but she did contend that the government had failed to move for detention in the proceeding before the Illinois magistrate, stating that "it's my understanding that the government is required to move for detention in Chicago where [the defendant] had his initial appearance. I think that he waived his identity hearing, but I don't believe he waived the detention hearing at that point." Feb. 16, 1989, Tr. 5. The New Mexico magistrate responded that "that's a matter we will have to take up—you can take up with the district judge if you want to." *Ibid.*

4. The government immediately requested that the district court review the magistrate's decision (see 18 U.S.C. 3145(a)(1) (Supp. V 1987)), and the district court held a *de novo* detention hearing on February 23, 1989. The government submitted that respondent posed both a risk of flight and a danger to the community. Feb. 23, 1989, Tr. 28, 121-128. Respondent contested that submission, *id.* at 108-120, 128-130, and also argued that he was entitled to release because the detention hearing had not been held within the time limits set forth in Bail Reform Act. *Id.* at 11-12, 17, 29-31.

On March 1, the district court ruled on the detention motion. The court found that respondent "has failed to rebut the resulting statutory presumption that no condition or combination of conditions will reasonably assure [his] appearance as required and the safety of the community." App., *infra,* 16a; see *id.* at 21a-24a. The court further concluded, however, that "there has been a failure to comply" with the Bail Reform Act's procedural provisions, "which precludes further detention of the [respondent] and mandates the setting of conditions for his release." *Id.* at 16a-17a. The district court relied on Section 3142(f) of the Bail Reform Act, which states that a detention hearing "shall be held immediately upon a person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance" and further provides that "[e]xcept for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the attorney for the government shall not exceed three days." See App., *infra,* 24a-26a.

The district court concluded that the Illinois magistrate's February 10th removal order and the New Mexico magistrate's February 16th sua sponte continuance, which was granted "in the interest of justice," App., *infra,* 19a, resulted in a violation of Section 3142(f)'s time limits. *Id.*

at 24a-30a. The court stated that a person may waive these time limits, but it concluded that respondent did not "knowingly and voluntarily" waive his right to a prompt hearing in this case. *Id.* at 27a-28a, 30a.

Turning to the issue of the appropriate remedy, the court acknowledged that "Congress did not explicitly state that a failure to comply with § 3142(f) mandates" pretrial release. App., *infra,* 31a. The court nevertheless concluded that "meaning can be given to § 3142(f) and Congress' intent can be fulfilled only by pretrial release under conditions." *Ibid.* The court amended the magistrate's release conditions to require bond in the amount of $8500 and issued an order allowing respondent's release. *Id.* at 16a-17a, 31a.

5. The government appealed and requested a stay of the district court's order. The court of appeals issued a temporary stay but ultimately affirmed the district court's ruling. App., *infra,* 1a-15a. The court of appeals concluded that "although the delay between the [respondent's] appearance in Illinois on February 10 and his first appearance in New Mexico on February 16 might be viewed as a minor violation of the maximum permissible period for a defense requested continuance, the further continuance of the hearing by the magistrate, *sua sponte,* constituted a material violation of the specific instructions Congress provided in crafting § 3142(f)." App., *infra,* 13a. The court further stated:

> If the mandatory restrictions on the length of time a hearing can be continued, delayed, or postponed are to have any import, we believe the consequences for violations, at least where material and not the fault of the defendant, must likewise be substantive. Under the circumstances of this case, the subsequent holding of a *de novo* hearing by the district court did not cure the fact that the New Mexico magistrate was without authority to extend the date of the hearing from

> February 16 to February 21 absent a finding of good cause. Thus, the district court was correct in selecting the only meaningful remedy available—release on conditions.

Id. at 14a-15a.

Since his release, respondent has failed to appear, as required, for subsequent court appearances. He is believed to have fled to Mexico.[2]

REASONS FOR GRANTING THE PETITION

The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, "represents the National Legislature's considered response to numerous perceived deficiencies in the federal bail process." *United States* v. *Salerno*, 481 U.S. 739, 742 (1987). It specifies the standards judicial officers must apply and the procedures they must follow in making pretrial detention and release determinations. See 18 U.S.C. 3142 (Supp. V 1987). Respondent met the standard for pretrial detention because he was found to present both a serious risk of flight and a danger to the community. The court of appeals found, however, that the magistrate made a procedural error in handling the detention issue: he failed to observe the "first appearance" provision of Section 3142(f) by not holding a detention hearing within the prescribed period after respondent's first appearance in court. The question presented by this case is whether that procedural misstep entitles respondent to automatic pretrial release without regard to the risk that he will flee or the danger that he poses to the community. This question, which has produced a conflict among the courts of appeals, has great practical significance. The court of appeals' resolution of the issue is incorrect and warrants this Court's review.

[2] Respondent's apparent flight does not render this case moot. The controversy remains live because its resolution will determine the course of proceedings if and when respondent is rearrested. See *United States* v. *Sharpe*, 470 U.S. 675, 681 n.2 (1985) ("Because our reversal of the Court of Appeals' judgment may lead to the reinstatement of respondents' convictions, respondents' fugitive status does not render this case moot."). See also *Florida* v. *Rodriguez*, 469 U.S. 1 (1984). If this Court reverses the court of appeals' holding that the magistrate's supposed failure to comply with the Bail Reform Act's "first appearance" requirement does not entitle respondent to release, then the government could detain respondent immediately upon his rearrest. If, however, the court of appeals' decision is left standing, then the government cannot detain respondent unless it first seeks revocation of the existing release order. See 18 U.S.C. 3148(b) (Supp. V 1987).

1. Section 3142(f) of the Bail Reform Act provides that upon motion of the government (or in certain circumstances, on the judicial officer's own motion) the judicial officer "shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community." 18 U.S.C. 3142(f) (Supp. V 1987). Section 3142(f) further states:

> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days.

This so-called "first appearance" provision has been a source of persistent controversy. For example, the courts of appeals have disagreed on whether a defendant may waive his right to an immediate detention hearing,[3] what

[3] Compare *United States* v. *Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc) ("We now hold that both the time requirements and

constitutes a "first appearance," [4] when a judicial officer may grant a continuance *sua sponte*,[5] and how weekends and holidays should be treated in calculating the time periods for a continuance.[6] These differences have resulted in substantial variation among the circuits in the procedures for making pretrial detention determinations.

---

the detention hearing itself provided for in section 3142 are waivable."), and *United States* v. *Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1985) ("Coonan, however, would have us hold that the statutory right to a detention hearing within, at most, five days of the initial appearance is not waivable. This we decline to do * * *."), with *United States* v. *Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985) ("The Bail Reform Act does not permit a waiver of time requirements by the defendant."). See also *United States* v. *Madruga*, 810 F.2d 1010, 1014 (11th Cir. 1987) ("Unless a defendant objects to the proposed hearing date on the stated ground that the assigned date exceeds the three-day maximum, he is deemed to acquiesce in up to a five-day continuance.").

[4] Compare *United States* v. *Maull*, 773 F.2d 1479, 1483 (8th Cir. 1985) (en banc) (footnote omitted) ("A fair reading of the statute is not that a detention hearing must be held "immediately" when a defendant first appears in court, else to be forever barred, but rather that once a motion for pretrial detention is made, a hearing must occur promptly thereafter."), with *United States* v. *Al-Azzawy*, 768 F.2d at 1144 ("The 'first appearance' would appear to mean the post-arrest hearing prescribed in Rule 5, Fed. R. Crim. P."). See also *United States* v. *Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986) ("a removal hearing may precede a detention hearing, leaving the latter normally to occur in the district of prosecution after removal").

[5] Compare *United States* v. *Alatishe*, 768 F.2d 364, 369 (D.C. Cir. 1985) ("except in the most compelling situations, the judicial officer should not act *sua sponte* to delay the detention hearing"), with *United States* v. *Hurtado*, 779 F.2d 1467, 1475 (11th Cir. 1985) ("a judicial officer has no authority to act *sua sponte* on questions of temporal continuances").

[6] Compare *United States* v. *Melendez-Carrion*, 790 F.2d at 991 (time computation excludes weekends and holidays), with *United States* v. *Hurtado*, 779 F.2d at 1474 n.8 (time computation includes weekends and holidays).

On a more fundamental issue, the courts of appeals are in disagreement concerning the appropriate remedy for failure to comply with the "first appearance" requirement. The First, Fourth, and Eleventh Circuits have indicated that a violation of the "first appearance" requirement does not prevent the government from seeking pretrial detention at a subsequent detention hearing.[7] The Ninth Circuit, joined by the Tenth Circuit in this case, have held, however, that a failure to observe that provision immunizes the person from subsequent detention.[8]

Although it is by no means clear that the delay in holding the detention hearing in this case violated the "first appearance" requirement, we limit our petition to the question whether the court of appeals chose the appropriate remedy for that arguable lapse. That question, which arises whenever a court finds that there has been a failure to follow the Bail Reform Act's procedural requirements,

---

[7] See *United States* v. *Vargas*, 804 F.2d 157, 162 (1st Cir. 1986) ("we see no basis for reversing the district court's detention order based on [the defendant's] arguments concerning the adequacy and timeliness of the detention hearing"); *United States* v. *Clark*, 865 F.2d at 1436 (4th Cir.) ("in cases where the requirements of the Bail Reform Act are not properly met, automatic release is not the appropriate remedy"); *United States* v. *Hurtado*, 779 F.2d at 1481-1482 (even though detention hearing held out of time, court instructs district court to "hold a *de novo* hearing under 18 U.S.C. § 3142 at which the merits of pretrial detention in this case are to be reconsidered").

[8] See *United States* v. *Al-Azzawy*, 768 F.2d at 1145 ("If the time constraints are violated in any material way, the district court should not order unconditional pretrial detention of the person."); App., *infra*, 15a ("Thus, the district court was correct in selecting the only meaningful remedy available—release on conditions."). See also *United States* v. *O'Shaughnessy*, 764 F.2d 1035, 1038-1039 (holding that noncompliance with the first appearance provision precludes detention), appeal dismissed on rehearing as moot, 772 F.2d 112 (5th Cir. 1985).

has continuing and far-reaching importance beyond the magistrate's supposed procedural error in this case. As Congress noted in enacting the Bail Reform Act, the government has encountered serious difficulties in securing the appearance of drug traffickers at trial. See S. Rep. No. 225, 98th Cong., 1st Sess. 20 (1983).[9] Procedural errors in the handling of detention hearings are bound to occur from time to time, particularly since the statute requires that the parties and the court act with great dispatch in the often chaotic period following a defendant's arrest. If a procedural slip—even a minor one such as exceeding by one day the permissible period for holding a detention hearing—requires the automatic release of the defendant, no matter how strong the case for detention, many defendants who are charged with serious crimes can be expected to flee before trial or commit serious crimes while on re-

---

[9] The Senate Report explains:

> It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses. Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers.

S. Rep. No. 225, *supra*, at 20 (footnote omitted).

lease. The class of persons as to whom the rule of automatic release will make a difference in their detention status are, after all, the persons who would otherwise be detained pending trial, *i.e.*, those persons for whom conditions of release will not "reasonably assure" their appearance at trial or the safety of the community. 18 U.S.C. 3142(e) (Supp. V 1987).

2. We submit that the court of appeals erred in imposing a remedy so plainly at odds with the objectives of the Bail Reform Act. The text of the statute does not require, or even suggest, that a magistrate's (or the government's) failure to observe the "first appearance" provision requires the release of a person who is otherwise subject to pretrial detention. Nor is there anything in the legislative history of the statute to suggest that Congress contemplated that absolute immunity from detention would follow from any violation of the statutory procedures. See S. Rep. No. 225, *supra*, at 21-22.

The logical remedy for a failure to provide a detention hearing at the defendant's "first appearance" is to provide a detention hearing at the earliest practicable opportunity thereafter. That remedy is responsive to the dual goals of the Bail Reform Act to require prompt resolution of the detention issue but at the same time to ensure that defendants are not released if it is determined that they present a serious risk of flight or danger to others.

The remedy we propose comports not only with the specific objectives of the Bail Reform Act, but also with the principle that the ultimate goal of criminal procedure is a just adjudication. An unnecessarily broad remedy, as much as an inadequately narrow remedy, subverts that goal. See, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). Thus, this Court has stated that, even in the case of constitutional violations, "remedies should be tailored to the injury suffered * * * and should not unnecessarily in-

fringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). The court of appeals' remedy in this case, which apparently has resulted in the predictable flight of a major drug trafficker, is fundamentally incompatible with "society's interest in the administration of criminal justice" (*ibid.*).

The court of appeals' remedy is also excessive when measured against the prejudice that the error caused respondent. The only prejudice respondent suffered was that he was held in custody for a few days longer than he would have been if a detention hearing had been held earlier and the district court had decided that respondent should be released.[10] The lower courts did not find, nor is there any basis for assuming, that the delay in holding the detention hearing prejudiced respondent in his ability to defend against the detention motion or to defend against the underlying allegations in the case.

Respondent's own conduct suggests that the delay was not prejudicial to him. Although he was represented by counsel, respondent did not insist on a prompt detention hearing. He specifically waived his right to an immediate detention hearing before the Illinois magistrate, he did not object to the New Mexico magistrate's decision to continue the hearing for three working days, and he did not move to accelerate the hearing during that period. See pp. 4-5, *supra*. Respondent's failure to insist on a prompt hearing is itself a persuasive indication that he suffered no prejudice, and perhaps even obtained some advantage, from the delay. Cf. *Barker* v. *Wingo*, 407 U.S. 514 (1972). In any

[10] Of course, since the district court determined that, but for the delay in holding the detention hearing, respondent should be detained, it turns out that the delay did not prejudice respondent at all, since the district court presumably would have reached the same conclusion following an earlier detention hearing and would have ordered respondent detained for the entire period before the trial.

event, the blunderbuss remedy of automatic release, regardless of the degree of prejudice and regardless of the risks associated with release, is inconsistent with this Court's concern that judicial remedies be responsive to the competing interests of the individual, the government, and society within the criminal justice system. In short, a rule of automatic release converts the pretrial detention procedures into " 'a game in which a wrong move by the judge means immunity for the prisoner.' " *Jones* v. *Thomas*, No. 88-420 (June 19, 1989), slip op. 10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General

JULY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-2056

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GUADALUPE MONTALVO-MURILLO, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CR-89-86)

[Filed May 31, 1989]

Per Curiam.

Before: Moore, Anderson, and Tacha, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This appeal is taken from an order of the United States District Court for the District of New Mexico setting terms and conditions of defendant's release pending trial,

notwithstanding the court's finding that no conditions or combination of conditions would reasonably assure his presence in court or the safety of the community, 18 U.S.C. § 3142(e).[1] The court directed release after determining that release on conditions was the appropriate remedy for violations of the failure to hold a detention

[1] (e) Detention. – If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial. In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that –

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) of this subsection was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code.

hearing within the time requirements of 18 U.S.C. § 3142(f).[2] We affirm.

[2] (f) Detention hearing. – The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community –

(1) upon motion of the attorney for the Government, in a case that involves –

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

(D) any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves –

(A) a serious risk that the person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not

We recite the facts from the district court's memorandum opinion and order filed March 1, 1989.

> On February 8, 1989 defendant, a Mexican citizen and legal resident alien of the United States, was arrested by United States Customs agents at a checkpoint in Orogrande, New Mexico in connection with the discovery of a substantial quantity of cocaine in an auxiliary gasoline tank mounted in the rear of defendant's pickup truck. According to the customs agents, defendant advised that his destination was Chicago, Illinois where he intended to make delivery of the cocaine, and at the agents' request defendant agreed to participate in a "controlled delivery" to the anticipated purchasers. The customs agents then met

---

exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

> with personnel of the Drug Enforcement Administration who made arrangements for the Chicago venture. Consequently, defendant flew to Chicago, Illinois in the company of a DEA agent and another DEA agent drove defendant's vehicle to Chicago where the controlled delivery was attempted. However, nobody showed up to receive the shipment in Chicago.
>
> On February 10, 1989 a complaint was filed in New Mexico and the United States Magistrate for the District of New Mexico issued a warrant for defendant's arrest; and defendant, who at the time was in Chicago, was taken before a United States Magistrate in Illinois for a hearing in accordance with Rule 40 of the Federal Rules of Criminal Procedure. This was defendant's initial appearance before a judicial officer.
>
> During the February 10 hearing Ms. Garza, the Assistant United States Attorney who was handling the case, advised the Magistrate that the Government "was going to move for detention" but an agreement had been reached with Ms. Green, defendant's court appointed counsel. Ms. Garza represented it had been agreed that defendant would consent to removal of the proceedings to New Mexico, where he was charged, if he would be returned to New Mexico immediately. Ms. Garza stated that they had also agreed that defendant would waive a detention hearing in Illinois, but he would not waive his rights to a preliminary hearing or a detention hearing in New Mexico.
>
> The United States Magistrate in Illinois did not ask defendant any questions to determine his ability to understand his rights and the nature of the proceeding. She asked no questions about his understanding of his rights under 18 U.S.C. § 3142(f). She did not make findings that defendant had knowingly and voluntarily waived his right to an immediate detention hearing or

that defendant had consented to a continuance. The Magistrate advised the defendant, through an interpreter, that before being sent back to New Mexico he had the right to a determination that there was probable cause to believe he committed an offense and that he was the person named in the complaint and further advised him that he was entitled to a hearing on detention or bail. The Magistrate then asked "Is that agreeable to you?" Defendant's counsel responded, obliquely, that "we are not waiving the preliminary hearing." The Magistrate then rephrased the question to defendant by asking "Is that acceptable?" Defendant's response, through the interpreter, was "Yes . . . if they want me to, I'm with them." Next, the Magistrate asked defendant if he had talked to his counsel, Ms. Green, "about it" and defendant's interpreted reply was "Yes, well she is Ms. Green, right?" The Magistrate said "yes" and "alright, then we will enter an order of removal specifically reserving the issues on detention and probable cause for determination by the District Court in New Mexico . . ." Defendant made no statements during the hearing in Illinois other than the two responses, set forth in full above, and a reply of "yes" to a question about whether he understood he was present for a removal hearing. The United States Magistrate in Illinois ordered that the defendant be returned to New Mexico; he was returned late on the evening of Friday, February 10, 1989 and was jailed in Las Cruces, New Mexico.

On the morning of Monday, February 13, 1989, a representative of the Drug Enforcement Administration conferred with the secretary in the office of the United State Magistrate in Las Cruces, New Mexico

about a date and time for a detention hearing and arraignment. The Office of the United States Magistrate for the District of New Mexico scheduled a hearing on Thursday, February 16, 1989. On Wednesday, February 15, 1989 the United States Magistrate appointed counsel to represent the defendant, but retained counsel appeared on defendant's behalf at the hearing the following day, February 16, 1989.

It appears that the Assistant United States Attorney and defendant were prepared to proceed with the detention hearing on February 16, 1989; neither the government nor the defendant moved for a continuance. However, at the beginning of the February 16 hearing the Magistrate stated that "in the interest of justice" the detention hearing should be rescheduled on February 21, 1989, apparently because a Pre-Trial Services Report had not yet been prepared. Again, at the Febuary 16, 1989 hearing, which was defendant's first appearance before a judicial officer in New Mexico, no inquiry was made of defendant's understanding of his right to an immediate detention hearing under 18 U.S.C. § 3142(f) and there was no finding that defendant had knowingly and voluntarily waived his right to an immediate hearing. In fact, the Magistrate did not advise defendant of any rights and asked him no questions. Moreover, the United States Magistrate made no finding, as required by 18 U.S.C. § 3142(f), that there was "good cause" to continue the hearing to February 21, 1989.

In regard to postponing the hearing to February 21, 1989, the Magistrate stated that the hearing would be held that date if the Government moved to detain the defendant and indicated that if it did not, on

February 21, 1989 the Magistrate would set conditions of release. The Government filed a Motion for Detention on February 17, 1989. This was the first detention motion that was actually made; the Government had intended to move for detention on February 10, 1989 before the Magistrate in Illinois, but had not done so by reason of the agreement reached with defendant's court appointed counsel in Illinois. Since the Government filed a written motion for detention on February 17, 1989, the United States Magistrate in Las Cruces, New Mexico proceeded with a detention hearing on February 21, 1989 at the conclusion of which the Magistrate said he would set conditions of release but would allow the Government an opportunity to appeal to United States District Court before entry of the order setting conditions of release. The United States Attorney therefore requested an immediate hearing before the District Court and that hearing was held on February 23, 1989.

The district court temporarily stayed its release order to enable the United States to file a notice of appeal; thereafter, we stayed defendant's release pending further order of the court.

The government argues that the February 21 hearing on the detention motion was timely, that defendant's waiver of an immediate detention hearing (in Illinois) was a request for an indefinite continuance of the hearing for good cause, and that even if a violation of § 3142(f) occurred, the remedy is a prompt detention hearing, not release. Defendant contends that the time constraints of § 3142(f) were violated and that the remedy chosen by the district court was correct.

First, we must determine the appropriate standard by which to review the district court's factual findings and

legal conclusions. Next we must consider whether the time requirements of § 3142(f) were violated under the facts of this case. Finally, if violations of § 3142(f) occurred, we must review the correctness of the district court's choice of remedy.

Under the Bail Reform Act of 1984, 18 U.S.C. § 3141, *et seq.*, pretrial detention is presumptively appropriate for certain offenders upon a finding that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." § 3142(e). Further, certain offenses carry a presumption that no such conditions or combination thereof will assure appearance and safety, including violations of the Controlled Substance Act, 21 U.S.C. § 801, *et seq.*, where there is probable cause to believe that the person committed an offense for which the maximum term of imprisonment is more than ten years. *Id.*

Under § 3142(a), upon the charged person's appearance before a judicial officer, the officer shall issue an order releasing the person on recognizance or on conditions, temporarily detaining the person under § 3142(d), or detaining the person under § 3142(e). This case involves only § 3142(e).

Detention under § 3142(e) requires a hearing under § 3142(f) on motion of the government (f)(1), or on motion of either the government or the judicial officer (f)(2), depending on certain factors, the hearing is to be held "immediately upon the person's first appearance before the judicial officer," unless a continuance is sought. Except for good cause, the government may have three days and the accused five. An accused may be detained pending completion of the hearing, at which time the person is afforded counsel and may testify by himself or by witnesses.

The ultimate finding for purposes of § 3142(e) "shall be supported by clear and convincing evidence." A detention order issued pursuant to (e) is required to include "written findings of fact and a written statement of the reasons for the detention." § 3142(i). In upholding the constitutionality of the Act, the Supreme Court noted that under § 3142(f), the arrestee is entitled to a prompt hearing. *United States v. Salerno*, 481 U.S. 739, 747 (1987).

Nothing in § 3142(e) provides for a "waiver" of the time requirements for the hearing, *United States v. Hurtado*, 779 F.2d 1467, 1474 n.7 (11th Cir. 1985); *United States v. Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985), although a short postponement from the initial appearance in the arresting district (here Illinois) to the first appearance in the charging district (here New Mexico) has been upheld. *See United States v. Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986) (removal hearing may precede detention hearing, leaving latter to occur in prosecuting district after removal). *See also United States v. Dominguez*, 783 F.2d 702, 704-705 (7th Cir. 1986).

Among the issues necessary to resolving the question of whether the detention hearing was timely are (1) when, under these facts, defendant had his first appearance, (2) whether an immediate detention hearing is waivable (and, if so, for how long), and (3) whether defendant in fact waived his right to an immediate hearing. We are confronted by the same difficulties as the district court because the facts are far from crystal clear.

At the outset, we join those circuits which have held that appellate review of detention or release orders is plenary, at least as to mixed questions of law and fact, and independent, with due deference accorded to the trial court's purely factual findings. *See United States v. Hurtado*, 779 F.2d at 1471-72, collecting and analyzing cases from the

First, Third, Sixth, Eighth, and Ninth Circuits: *United States v. Bayko*, 774 F.2d 516, 519-20 (1st Cir. 1985); *United States v. Delker*, 757 F.2d 1390, 1399-1400 (3d Cir. 1985); *United States v. Hazime*, 762 F.2d 34, 36-37 (6th Cir. 1985); *United States v. Maull*, 773 F.2d 1479, 1487 (8th Cir. 1985); *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985). *See also United States v. Portes*, 786 F.2d 758, 762 (7th Cir. 1985) (joining majority of circuits adopting independent review standard).

At the hearing before the magistrate in Illinois, the government did not specifically move for pretrial detention because counsel for both sides and the defendant had agreed that the preliminary and detention hearings should take place in New Mexico. The government's intention to move for pretrial detention, however, is clear enough, and defendant was thus provided with ample notice of the government's proposed course of action. Additionally, § 3142(f)(1) does not expressly require the government to make a written motion for pretrial detention. *United States v. Volksen*, 766 F.2d 190, 192 (5th Cir. 1985). On this record, we believe the government adequately moved for pretrial detention at the Illinois hearing.

However, by the time of the first hearing before the magistrate in New Mexico on February 16, six days had elapsed since defendant's arrival there. The government had not yet filed a formal motion for pretrial detention, nor had a motion for continuance been sought. Even if we assume that on February 10 defendant could be deemed to have waived his right to an immediate detention hearing (a question we need not answer), and even if we construe counsel's agreement to postpone the detention hearing as an implicit request for a continuance under § 3142(f)(2), the permissible time period had expired by February 16. *See, e.g., United States v. Malekzadeh*, 789 F.2d 850, 851

(11th Cir. 1986) (defendant can implicitly agree to continuance of detention hearing); *United States v. Valenzuela-Verdigo*, 815 F.2d 1011, 1015-16 (5th Cir. 1987) (inferring from record that five-day continuance from initial appearance to hearing was "in substance" requested by defendant).

Most troubling, however, is the magistrate's decision, *sua sponte*, to further continue the matter to February 21. The statute does not authorize a continuance by the judicial officer. *See United States v. Alatishe*, 768 F.2d 364, 369 (D.C. Cir. 1985) (judicial officer should not *sua sponte* delay detention hearing except in most compelling situations); *United States v. Hurtado*, 779 F.2d at 1475 (judicial officer lacks authority to *sua sponte* extend time for hearing).

The magistrate couched his continuance of the hearing in the following language:

> All right. I think, therefore, in the interest of judgment (sic), that I should continue the detention hearing for a maximum of three working days, *as the United States wishes to request*. (Emphasis added.)

Vol. II, p. 5.

However, neither the government nor the defendant requested a continuance. Further, it is fair to conclude from reading the transcript of the February 16 hearing that the magistrate did not intend to conduct the detention hearing until the pretrial services report had been prepared. (Vol. II, pp. 5-6.) There is no indication why this report was not prepared between February 13 when the magistrate's office was first contacted regarding defendant and February 16 when the initial hearing was held in the charging district. There was no finding of good cause for the continuance under § 3142(f), nor would the lack of a pretrial services report, without more, necessarily constitute good cause.

We conclude, then, as did the district court, that although the delay between the defendant's appearance in Illinois on February 10 and his first appearance in New Mexico on February 16 might be viewed as a minor violation of the maximum permissible period for a defense requested continuance, the further continuance of the hearing by the magistrate, *sua sponte*, constituted a material violation of the specific instructions Congress provided in crafting § 3142(f).

What Congress did not provide, however, is the remedy. Consequently, circuit courts are divided in their conclusions as to what the remedy should be (which again is compounded by the variety of factual situations in which the question arises). *Compare United States v. Al-Azzawy*, 768 F.2d at 1145 (if time constraints violated in material way, district court should not order unconstitutional pretrial detention); *United States v. Payden*, 759 F.2d 202, 205 (2d Cir. 1985) (remedy for failure to provide hearing at first appearance was reconsideration under prior bail law); *United States v. O'Shaughnessy*, 764 F.2d 1035, 1038-39 (5th Cir. 1985) (noncompliance with first appearance requirement for hearing precludes detention) appeal dismissed on rehearing as moot 772 F.2d 112 (5th Cir. 1985); *with United States v. Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc) (automatic release not appropriate remedy where requirements of Bail Reform Act not properly met); *United States v. Coonan*, 826 F.2d 1180, 1185 (2d Cir. 1987) (where defendant otherwise incarcerated and defense counsel's position is that immediate hearing is unnecessary, government is not precluded from seeking detention even if hearing is more than five statutory days after initial appearance); *United States v. King*, 818 F.2d 112, 114-115 (1st Cir. 1987) (where defendant already serving state sentence, detention hearing not required until release from state custody im-

minent); *United States v. Vargas*, 804 F.2d 157, 162 (1st Cir. 1986) (assuming detention hearing inadequate and untimely, subsequent *de novo* hearing by district court cured defect); *United States v. Hurtado*, 779 F.2d at 1481-82 (where hearing untimely and inadequate, detention order would be reversed and matter remanded for *de novo* hearing at which merits of pretrial detention to be reconsidered). *See also United States v. Madruga*, 810 F.2d 1010, 1014 (11th Cir. 1987) (where defendant fails to object to hearing date, he can be deemed to acquiesce in up to five-day continuance); *United States v. Holloway*, 781 F.2d 124, 128-29 (8th Cir. 1986) (where government's request for detention made at second appearance before same judicial officer, district court's original order setting bond would be reinstated); *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985) (no error in magistrate's scheduling of hearing five days after initial appearance where defendant needed to obtain counsel, no objection to continuance raised, and continuance not suggested by government).

Whether we construe defendant's February 10 agreement to move the hearing to New Mexico as a request for a five-day continuance or a waiver of the right to an immediate hearing, the second continuance, from February 16 to February 21, cannot be justified. Nor do we agree with the premise that the waiver of an immediate hearing "can be viewed as a request for an indefinite continuance for good cause." *United States v. Clark*, 865 F.2d at 1437.

If the mandatory restrictions on the length of time a hearing can be continued, delayed, or postponed are to have any import, we believe the consquences for violations, at least where material and not the fault of the defendant, must likewise be substantive. Under the circumstances of this case, the subsequent holding of a *de novo* hearing by the district court did not cure the fact that the

New Mexico magistrate was without authority to extend the date of the hearing from February 16 to February 21 absent a finding of good cause. Thus, the district court was correct in selecting the only meaningful remedy available—release on conditions.

Accordingly, the memorandum opinion and order filed March 1, 1989, is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Cr. No. 89-86 JC

UNITED STATES OF AMERICA, PLAINTIFF

v.

GUADALUPE MONTALVO-MURILLO, DEFENDANT

[Filed Mar. 1, 1989]

MEMORANDUM OPINION AND ORDER

On February 21, 1989, following a detention hearing held under 18 U.S.C. § 3142(f), the United States Magistrate for the District of New Mexico prepared, but did not enter, an order setting conditions of release of the defendant. Plaintiff took an immediate appeal to the District Court for a *de novo* hearing pursuant to 18 U.S.C. § 3142 which was held on February 23, 1989. Based on the evidence presented during the *de novo* hearing, I find that there is probable cause to believe that the defendant committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act and that the defendant has failed to rebut the resulting statutory presumption that no condition or combination of conditions will reasonably assure defendant's appearance as required and the safety of the community. However, I also determined that there has been a failure to comply with 18 U.S.C. § 3142(f)

which precludes further detention of the defendant and mandates the setting of conditions for his release. In addition, I find that the Order Setting Conditions of Release prepared by the United States Magistrate on February 21, 1989 is appropriate with one exception, and that it should be entered as the order of this court after amending paragraph 7(j) to require a bond in the amount of $88,500.00, secured by the execution and delivery of mortgages or other legal instruments covering the unencumbered assets of defendant and his wife, before defendant is released.[1]

Background. On February 8, 1989 defendant, a Mexican citizen and legal resident alien of the United States, was arrested by United States Customs agents at a checkpoint in Orogrande, New Mexico in connection with the discovery of a substantial quantity of cocaine in an auxiliary gasoline tank mounted in the rear of defendant's pickup truck. According to the customs agents, defendant advised that his destination was Chicago, Illinois where he intended to make delivery of the cocaine, and at the agents' request defendant agreed to participate in a "controlled delivery" to the anticipated purchasers. The customs agents then met with personnel of the Drug Enforcement Administration who made arrangements for the Chicago venture. Consequently, defendant flew to Chicago, Illinois in the company of a DEA agent and another DEA agent drove defendant's vehicle to Chicago where the controlled delivery was attempted. However, nobody showed up to receive the shipment in Chicago.

---

[1] Defendant advised Pre-Trial Services that his unencumbered assets included the residence which he valued at $85,000.00 and two vehicles which he valued at $8,500.00. One of the two vehicles was defendant's 1985 Ford pickup, valued at $5,000.00, which the DEA now possesses.

On February 10, 1989 a complaint was filed in New Mexico and the United States Magistrate for the District of New Mexico issued a warrant for defendant's arrest; and defendant, who at the time was in Chicago, was taken before a United States Magistrate in Illinois for a hearing in accordance with Rule 40 of the Federal Rules of Criminal Procedure. This was defendant's initial appearance before a judicial officer.

During the February 10 hearing Ms. Garza, the Assistant United States Attorney who was handling the case, advised the Magistrate that the Government "was going to move for detention" but an agreement had been reached with Ms. Green, defendant's court appointed counsel. Ms. Garza represented it had been agreed that defendant would consent to removal of the proceedings to New Mexico, where he was charged, if he would be returned to New Mexico immediately. Ms. Garza stated that they had also agreed that defendant would waive a detention hearing in Illinois, but he would not waive his rights to a preliminary hearing or a detention hearing in New Mexico.

The United States Magistrate in Illinois did not ask defendant any questions to determine his ability to understand his rights and the nature of the proceeding. She asked no questions about his understanding of his rights under 18 U.S.C. § 3142(f). She did not make findings that defendant had knowingly and voluntarily waived his right to an immediate detention hearing or that defendant had consented to a continuance. The Magistrate advised the defendant, through an interpreter, that before being sent back to New Mexico he had the right to a determination that there was probable cause to believe he committed an offense and that he was the person named in the complaint and further advised him that he was entitled to a hearing on detention or bail. The Magistrate then asked "Is that agreeable to you?" Defendant's counsel responded, obliquely, that "we are not

waiving the preliminary hearing." The Magistrate then rephrased the question to defendant by asking "Is that acceptable?" Defendant's response, through the interpreter, was "Yes . . . if they want me to, I'm with them." Next, the Magistrate asked defendant if he had talked to his counsel, Ms. Green, "about it" and defendant's interpreted reply was "Yes, well she is Ms. Green, right?" The Magistrate said "yes" and "alright, then we will enter an order of removal specifically reserving the issue on detention and probable cause for determination by the District Court in New Mexico . . ." Defendant made no statements during the hearing in Illinois other than the two responses, set forth in full above, and a reply of "yes" to a question about whether he understood he was present for a removal hearing. The United States Magistrate in Illinois ordered that the defendant be returned to New Mexico; he was returned late on the evening of Friday, February 10, 1989 and was jailed in Las Cruces, New Mexico.

On the morning of Monday, February 13, 1989, a representative of the Drug Enforcement Administration conferred with the secretary in the office of the United States Magistrate in Las Cruces, New Mexico about a date and time for a detention hearing and arraignment. The Office of the United States Magistrate for the District of New Mexico scheduled a hearing on Thursday, February 16, 1989. On Wednesday, February 15, 1989 the United States Magistrate appointed counsel to represent the defendant, but retained counsel appeared on defendant's behalf at the hearing the following day, February 16, 1989.

It appears that the Assistant United States Attorney and defendant were prepared to proceed with the detention hearing on February 16, 1989; neither the government nor the defendant moved for a continuance. However, at the beginning of the February 16 hearing the Magistrate stated that "in the interest of justice" the detention hearing

should be rescheduled on February 21, 1989, apparently because a Pre-Trial Services Report had not yet been prepared. Again, at the February 16, 1989 hearing, which was defendant's first appearance before a judicial officer in New Mexico, no inquiry was made of defendant's understanding of his right to an immediate detention hearing under 18 U.S.C. § 3142(f) and there was no finding that defendant had knowingly and voluntarily waived his right to an immediate hearing. In fact, the Magistrate did not advise defendant of any rights and asked him no questions. Moreover, the United States Magistrate made no finding, as required by 18 U.S.C. § 3142(f), that there was "good cause" to continue the hearing to February 21, 1989.

In regard to postponing the hearing to February 21, 1989, the Magistrate stated that the hearing would be held that date if the Government moved to detain the defendant and indicated that if it did not, on February 21, 1989 the Magistrate would set conditions of release. The Government filed a Motion for Detention on February 17, 1989. This was the first detention motion that was actually made; the Government had intended to move for detention on February 10, 1989 before the Magistrate in Illinois, but had not done so by reason of the agreement reached with defendant's court appointed counsel in Illinois. Since the Government filed a written motion for detention on February 17, 1989, the United States Magistrate in Las Cruces, New Mexico proceeded with a detention hearing on February 21, 1989 at the conclusion of which the Magistrate said he would set conditions of release but would allow the Government an opportunity to appeal to United States District Court before entry of the order setting conditions of release. The United States Attorney therefore requested an immediate hearing before the District Court and that hearing was held on February 23, 1989.

Flight Risk and Community Danger. U.S. Customs agents inspected the defendant's 1985 Ford pickup, in which defendant was the only occupant, at approximately 3:30 A.M., February 8, 1989 at a checkpoint near Orogrande, New Mexico and discovered 72 pounds of cocaine, with an estimated street value of almost one million dollars, in an auxiliary fuel tank having no fuel line connections. On February 17, 1989 a Grand Jury indicted defendant for possessing with intent to distribute more than 5 kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(B)(1)(a), the penalty for which would be a term of imprisonment of not less than 10 years and could be life imprisonment. The indictment was enough to support a finding of probable cause giving rise to the rebuttable statutory presumption under 18 U.S.C. § 3142(e).

In an effort to rebut the statutory presumption raised by 18 U.S.C. § 3142(e), defendant produced evidence which showed that he resided and worked in Chicago, Illinois as a legal resident alien from approximately 1979 to mid-1986 and that in 1980 he married Elisa Madrigal Salgado with whom he had three children, all of whom are United States citizens by reason of their birth in the United States. W-2 forms submitted by defendant reflect that he earned wages from employment in Chicago totalling $22,342.34 in 1985 and $14,086.77 in 1986. Defendant also submitted documents in Spanish which indicate that in August, 1986 he purchased a residence in Ciudad Juarez, Mexico for $40,000.00 which he sold in May, 1988 for $57,000.00 and that he sold a business in Cuidad Juarez, Mexico in May, 1987 for $27,800.00; however, these documents do not state that the transactions were for cash. In addition, defendant provided documents which show that on June 8, 1988 he and his wife purchased a residence in El Paso, Texas in the name of his wife, Elisa Madrigal Salgado, at

which gas and electric utilities were registered in the name of the defendant. Defendant and his wife purchased the El Paso residence for approximately $85,000.00 *cash*.

Counsel for the defendant represented that defendant and his family had resided at the residence in El Paso, Texas for five months prior to defendant's arrest in February 1989. From approximately mid-1986 until the fall of 1988, defendant and his family resided in Ciudad Juarez, Mexico, which has a common border on the Rio Grande, with El Paso, Texas. While residing in Ciudad Juarez, defendant operated retail stores. The evidence regarding defendant's activities from which he has earned a livelihood during the last five months while he has been residing in El Paso, Texas is rather vague. During a proffer made by defendant's counsel, there was mention of trading livestock. It is clear, however, that defendant's last employment, documented by W-2 forms or other tax information, was during 1986 in Chicago with American Electric Cordsets. Defendant furnished no documentation of earnings from the retail establishments he claims to have operated in Ciudad Juarez or from employment or business enterprises during the last five months while residing in El Paso, Texas.

Although he lived and worked in Chicago for approximately seven years, defendant returned with his family to Mexico, the country of his citizenship, where he lived for approximately two years before purchasing a home in El Paso, Texas where he and his family have resided for only the last five months. Defendant has strong ties to Mexico where he was born, lived most of his life, and recently operated business enterprises. Defendant is 31 years of age. He has been an adult ten years. If convicted of the crime charged, he likely will be imprisoned for at least the next ten years of his life, years during which his children will be growing up. The temptation to move back across

the Rio Grande will be great. These factors suggest that defendant is a flight risk and that there are no conditions or combinations of conditions which would reasonably assure his appearance in court as required.

In regard to the matter of defendant being a danger to the community, his counsel argued that defendant was merely a "mule" on the lowest rung of the drug trafficking ladder and that the quantity of cocaine found in his possession, although substantial, should not alone support a finding that he is a danger to the community, especially since there is no direct evidence that defendant transported contraband on occasions other than the time he was caught. I believe, however, that there is significant additional evidence from which it could reasonably be inferred that defendant has been much more deeply involved in drug trafficking than a low paid courier intercepted on his first mission. When stopped by U.S. Customs, defendant was the sole occupant of his pickup truck, which he owned, and which had a customized auxiliary fuel tank designed to transport contraband. Moreover, defendant and his wife had purchased a new home in El Paso, Texas in June 1988 for approximately $85,000.00 in cash and subsequently paid for utilities although defendant failed to prove any substantial means of support after selling his retail businesses in Ciudad Juarez. Although there was mention of cattle trading, defendant produced no evidence indicating that this activity generated any profit. Defendant had $6,500.00 in cash in his possession in addition to the approximately one million dollars worth of cocaine when he was intercepted on February 8, 1989. In the absence of credible evidence of other recent sources of income, the more reasonable inference to be drawn is that defendant had access to substantial sums of cash and possessed a very valuable load of cocaine because he had been engaging in drug trafficking, an enterprise with which

he has had more experience than a "mule" on a first time venture. Consequently, I also find that there is no condition or combination of conditions which would reasonably assure the safety of the community if the defendant were to be released.

Non-compliance with 18 U.S.C. § 3142(f). The Tenth Circuit has not directly addressed the requirements of 18 U.S.C. § 3142(f).[2] Other circuits that have considered § 3142(f) have unanimously taken the view that § 3142(f) should be read strictly. *E.g., United States v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986) (en banc); *United States v. Al-Azzawy*, 768 F.2d 1141 (9th Cir. 1985); *United States v. O'Shaughnessy*, 764 F.2d 1035 (5th Cir.) (per curiam), *vacated on reh'g as moot*, 772 F.2d 112 (5th Cir. 1985) (per curiam); *United States v. Payden*, 759 F.2d 202 (2d Cir. 1985). The history of the Bail Reform Act of 1984 makes evident the reasons for strict construction of the statute. The Bail Reform Act of 1984 substantially revised the Bail Reform Act of 1966 so that in addition to detaining an individual who is a flight risk, the court may now detain a defendant prior to trial if no conditions of release can assure the safety of specific individuals or the community.

---

[2] Although the Tenth Circuit has not interpreted the requirements of § 3142, the court has indicated its intention to construe strictly the requirements of § 3142(f). In *United States v. Rivera*, 837 F.2d 906, 925 (10th Cir. 1988), the government moved for detention and the defendant requested a continuance in order to prepare. The court granted a five-day continuance subject to defendant's right to request a shorter time. For reasons not set forth in the opinion, a detention hearing was never held. Defendant argued that all charges should be dropped because the failure to conduct a hearing was tantamount to denial of bail without a hearing, in violation of the Eighth Amendment. The court held that failure to conduct a detention hearing "demanded by the statute [was] inexcusable," but was not sufficient reason to dismiss all charges. *Id.*

Sensitive to pretrial deprivation of liberty, yet concerned about crimes committed by defendants on pretrial release, Congress "carefully drafted" pretrial detention procedural requirements in order "to provide adequate procedural safeguards." S.Rep. No. 225, 98th Cong. 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3191. *See also, United States v. Salerno*, 481 U.S. 739 (1987) (Bail Reform Act's extensive procedural requirements safeguard against constitutional violations). Congress believed that these procedural mechanisms rendered pretrial detention constitutional, and on this basis, courts have construed strictly the time limitations of § 3412(f). *See, e.g., United States v. Hurtado*, 779 F.2d 1467, 1474-75 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986) (en banc).

Section 3142(f) authorizes a judicial officer to hold a detention hearing:

> (1) upon motion of the attorney for the Government . . . immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days.

There are two interpretations of the language of § 3142(f). Some courts intepret the time limitations of the statute to mean that the government under no circumstances may obtain a continuance in excess of three days. Under this analysis, a continuance of up to three days may be granted the government; however, any continuance in excess of three days must occur at the request of the defendant, and good cause must exist in order to continue a detention hearing beyond the five days permitted the defendant by

statute. *See United States v. Melendez-Carrion*, 790 F.2d 984, 992 (2d Cir. 1986). Other courts have ruled that upon a showing of good cause, either party may exceed the time limitations set forth in the statute; the government may obtain a continuance in excess of three days, and the defendant may obtain a continuance of more than five days. *United States v. Hurtado*, 779 F.2d 1467, 1474 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986) (en banc); *United States v. Al-Azzawy*, 768 F.2d 1141, 1144 (9th Cir. 1985). However, under either interpretation of § 3142(f), in the absence of a finding of good cause, the period of a continuance sought by the government and of one sought by the defendant is limited to three and five days, respectively, in light of the fact that the defendant remains detained.

Several courts addressing the issue have found that a defendant can waive the time requirements of § 3142(f). In *United States v. Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1987), the court held that where defense counsel stated that "bail was not an issue" since the defendant was being held without bond in state custody on unrelated charges, the defendant implicitly waived his right to a detention hearing within five days. In *United States v. Clark*, No. 88-5079 (4th Cir. Jan. 9, 1989) (1989 U.S. App. Lexis 100), the court held that the defendants, with assistance of counsel, had explicitly, knowingly and voluntarily waived their rights to a timely hearing because of their desire to remain in protective custody. The Magistrate in that case had determined by direct questioning of the defendants about their rights that they understood the proceedings and the waiver of their rights. *Accord, United States v. King*, 818 F.2d 112, 115, n.3 (1st Cir. 1987). Other courts have stated that a defendant may not waive the time limits of § 3142. *United States v. Hurtado*, 779 F.2d 1467 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986)

(en banc); *United States v. Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985).

After review of authorities, I am persuaded that the time limits imposed by § 3142 are waivable but such waiver must be knowing and voluntary. *See, United States v. Clark*, No. 88-5079 (4th Cir. Jan. 9, 1989) (1989 U.S. App. Lexis 100); *United States v. King*, 818 F.2d 112, 115 n.3 (1st Cir. 1987) (defendant should state whether or not he or she objects to a postponement). Cf. *Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver of right to counsel must be "made with eyes open"); *Brady v. United States*, 397 U.S. 742, 748 (1970) (waiver of right to trial must be made with "sufficient awareness of the relevant circumstances and likely consequences"). The statute was intended to safeguard constitutional rights and timeliness of the detention determination was made a critical component of the procedural safeguards that Congress and the Supreme Court considered essential. Since waiver of a timely hearing can effectively constitute a waiver of the Eighth Amendment right not to be deprived of liberty prior to conviction without a proper finding of flight risk and community danger, any such waiver must be knowing and voluntary.

In this case, however, the defendant did not knowingly and voluntarily waive his right to a detention hearing or waive his rights to the time limits contained in the statute. At the Illinois hearing the defendant merely waived his right to the location of the detention hearing, i.e., to have it conducted in Illinois. Indeed, there was absolutely no discussion of the time limitations of § 3142 during the proceeding before the United States Magistrate in Illinois. As indicated above, the defendant made only three responses to questions during the Illinois hearing, none of which can be understood to constitute a knowing waiver of his right to a timely detention hearing. In addition, his court-

appointed counsel made no statements that indicate the defendant's awareness and waiver of his rights. The Illinois Magistrate seemed to be seduced by the notion that promptly returning defendant to New Mexico without first ascertaining whether he could and did understand his rights would resolve any problem. If the Magistrate had asked questions to determine whether defendant was capable of understanding his rights and the proceeding, had advised the defendant of his rights regarding the deadlines for holding a detention hearing and had inquired whether the defendant knowingly and voluntarily waived the deadlines, the problem that has arisen in this case could have been avoided.

Courts have also recognized that by implication a defendant can be deemed to have requested a continuance to a date within the five-day limit of § 3142 applicable to defendants. In *United States v. Malekzadeh,* 789 F.2d 850 (11th Cir. 1986), the court held the defendant implicitly requested a continuance for four days when the government requested a three-day continuance and neither the defendant or his retained counsel voiced any objection to holding the hearing on the fourth day in order to avoid a Sunday hearing.[3] Even if it can be implied that at the February 10, 1989 hearing in Illinois the defendant moved for a continuance in this case, the maximum time permitted without a finding of good cause would be five days. Assuming, without deciding, that the time computation should exclude weekend days and holidays,[4] the detention hearing

[3] The Eleventh Circuit includes weekend days for purposes of computing the time deadlines under § 3142. See discussion, *infra* note 4.

[4] The circuits are split on whether weekend days and holidays should be counted for purposes of computing the time requirements of § 3142(f). *United States v. Hurtado,* 779 F.2d 1467, 1474 n.8 (11th Cir. 1985) (includes weekend days and holidays for purposes of time computation); *United States v. Melendez-Carrion,* 790 F.2d 984, 991 (2d Cir. 1986) (time computation should exclude weekends and holidays). In view of the fact that the time requirements would not be met in this case even if weekends and holidays were omitted from the time computation, I need not decide this issue.

should have been held not later than February 16, 1989. No detention hearing was held on that date even though it appears that the parties were prepared to go forward with the hearing on February 16, 1989.

Courts have held that a judicial officer lacks authority under § 3142(f) to continue the detention hearing on his or her own motion, *United States v. Al-Azzawy,* 768 F.2d 1141, 1144 (9th Cir. 1985), or to make a *sua sponte* finding of good cause to extend the time for the hearing beyond the time requested in a motion for continuance. *United States v. Hurtado,* 779 F.2d 1467, 1475-76 (11th Cir. 1985), *reh'g denied,* 788 F.2d 1570 (1986) (en banc). On February 16, 1989, the United States Magistrate in New Mexico, without making a finding of good cause and without a request by either party for a continuance, rescheduled the detention hearing for February 21, 1989, "in the interests of justice." The Magistrate's desire to review a Pre-trial Services report prior to holding the detention hearing did not provide authority for the rescheduling absent a finding of good cause and a request for continuance.[5]

[5] At the hearing on February 16, 1989, the Magistrate indicated that he would hold the detention hearing on February 21, 1989 if counsel for the government moved for detention. Although I am not deciding here whether the government's mere announced intention to have moved for detention during the Illinois hearing on February 10, 1989 complied with the requirement that the government make a motion immediately upon the person's first appearance, there may have been a failure to comply with § 3142(f) since a Motion for Detention was not actually filed until February 17, 1989.

Congress cautiously placed limitations on a defendant's right to bail when it enacted the Bail Reform Act of 1984. The statute must be read strictly to comply with Congress' intent and the mandates of the Constitution. I find, therefore, that the defendant did not knowingly and voluntarily waive his right to a timely detention hearing, and the detention hearing on February 21, 1989 was held in violation of the time limits imposed under § 3142(f) of the Bail Reform Act of 1984.

Remedy. Having found that the requirements of § 3142 were not met, I must decide the appropriate remedy. In *United States v. Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985), the Ninth Circuit held that if time constraints of the Bail Reform Act were violated, the district court should not order unconditional pretrial detention of the person. *See also, id.* at 1146, 1148 (Farris, J., concurring, stating district court remains free to impose appropriate conditions of release under § 3142(f)). *Accord, United States v. O'Shaughnessy*, 764 F.2d 1035, 1038 (per curiam), *vacated on reh'g as moot*, 772 F.2d 112 (5th Cir. 1985) (per curiam). However, in *United States v. Hurtado*, 779 F.2d 1467, 1482 (11th Cir. 1985), *reh'g denied*, 788 F.2d 1570 (11th Cir. 1986) (en banc), after careful analysis of the strict limitations imposed by § 3142, the court remanded the case for a *de novo* hearing on the issue of the defendant's detention. *Hurtado* thus left open the possibility that a defendant could be detained prior to trial even where there was a failure to comply with the statutory requirements. In *United States v. Clark*, No. 88-5079 (4th Cir. Jan. 9, 1989) (1989 U.S. App. Lexis 100), the Fourth Circuit, citing the *Hurtado* decision, ruled that even where the requirements of § 3142 are not properly met, automatic release of the defendant is not the appropriate remedy. In *Clark*, however, the failure to comply with the statutory requirements was due to the defendants' ex-

pressed desire to be detained for reasons of personal safety. Therefore, *Clark* is clearly distinguishable from this case.

In view of Congress' strongly expressed concern that strict procedural safeguards be implemented to avoid constitutional problems, I believe that pretrial detention is not permissible in a case with a factual situation like that presented here. In 18 U.S.C. § 3142(f) Congress clearly and precisely established very limited time deadlines and a sole means of extending them through a judicial finding of good cause. Nothing in the language of § 3142(f) suggests or implies that Congress intended that these carefully crafted protections could be given up by a defendant without a knowing, voluntary waiver. Athough Congress did not explicitly state that a failure to comply with § 3142(f) mandates release on conditions in cases where there is no valid waiver, that, I think, is the import of the § 3142(f) terminology selected by Congress. In a case like this, meaning can be given to § 3142(f) and Congress' intent can be fulfilled only by pretrial release under conditions. I will, therefore, order release pending trial under conditions as set forth in the Magistrate's proposed order, as amended.

IT IS ORDERED that plaintiff's appeal from the Magistrate's oral ruling that he would enter an order setting condition of release is denied; and

IT IS FURTHER ORDERED that the Magistrate's proposed conditions of release, as amended in accordance with this Memorandum Opinion and Order, will be set forth in a separate order setting conditions of release, which will be entered by this court.

/s/ JAMES A. PARKER
James A. Parker
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 89-2056

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GUADALUPE MONTALVO-MURILLO, DEFENDANT-APPELLEE

[Entered May 31, 1989]

JUDGMENT

Before: Moore, Anderson, and Tacha, Circuit Judges.

This cause came on to be heard on appeal from the United States District Court for the District of New Mexico and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00339

NO. 89-163

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Petitioner,

v.

GUADALUPE MONTALVO-MURILLO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BERNARD J. PANETTA, II
MARY STILLINGER
Attorneys for Respondent
CABALLERO, PANETTA & ORTEGA
521 Texas Avenue
El Paso, Texas 79901
(915) 544-0042

15 pp

QUESTION PRESENTED

Whether the remedy for noncompliance with the time limits set forth in the Bail Reform Act, 18 U.S.C. 3142(f), is release on conditions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 89-163

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

UNITED STATES OF AMERICA,
Petitioner,

v.

GUADALUPE MONTALVO-MURILLO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent, Guadalupe Montalvo-Murillo, by and through his undersigned attorneys, opposes the Petition for Writ of Certiorari filed by the United States.

JURISDICTION

This Court lacks jurisdiction to review the judgment of the United States Court of Appeals for the Tenth Circuit, because the issue decided by that Court is now moot. See Reasons for Denying the Writ, infra.

STATEMENT OF FACTS

The statement of facts set forth by Petitioner in its brief is in large part accurate. This statement will only clarify the events that occurred after Respondent's return to New Mexico.

Petitioner asserts that on Monday morning, February 13, 1989, an agent with the Drug Enforcement Administration asked the office of the United States Magistrate in Las Cruces, New Mexico, to arrange for Respondent's detention hearing.

Although it appears that a DEA agent contacted the office of the United States Magistrate, the agent who testified at the hearing in district court was not sure whether the Magistrate was informed that the government intended to file a motion to detain, or informed that it had already filed a motion to detain. February 23, 1989, Tr. 96.

In any event, the Magistrate's actions would suggest that he did not know at the time of the hearing on February 16, 1989, that the government had already moved to detain Respondent. The Magistrate continued the detention hearing for three days, and instructed the attorney for the government to

file its motion to detain. February 16, 1989, Tr. 5.[1]

On February 16, 1989, counsel for Respondent did not object to the continuance specifically, but objected to the holding of a detention hearing at all. Prior to the detention hearing on February 21, 1989, Respondent filed an opposition to the detention of the defendant without bond, urging that the government's motion to detain, having been filed on February 17, 1989, was untimely.[2] It was not until the hearing before the district court, on February 23, 1989, that the attorney for the government shared with the court and with the defendant the fact that a motion to detain had been made in Chicago at the defendant's initial appearance.

After his release on bond, Respondent

---

[1] The government moved for pretrial detention at Respondent's initial appearance in Chicago, although the petition does not expressly state this fact. The government vigorously argued that position before the district court. February 23, 1989, Tr. 9-10. Further, the Court of Appeals found that the government adequately moved for detention in Chicago.

[2] The written motion to detain was filed on February 17, 1989.

failed to appear for his next court date. As of the filing of this opposition, Respondent is still a fugitive.

REASONS FOR DENYING THE WRIT

1. The issue presented for review by the Petitioner is moot, and therefore this Court does not have jurisdiction to hear this case. The controversy in this case is whether the Respondent should be detained pending trial. Respondent was ordered released on conditions, and subsequently failed to appear in court. The government now has the option of moving to revoke Respondent's release pursuant to 18 U.S.C. 3148(b). There is no requirement that the government wait until the Respondent is rearrested before moving to revoke the release order. In addition, the government could charge Respondent with the separate offense of failure to appear, under 18 U.S.C. 3146, and detain him under that charge when he is arrested. The fact that the government has not taken either of these steps cannot keep this controversy alive. The flight of the Respondent, in violation the conditions of his release, has caused the controversy to come to an end, and this case should be treated as moot. The government may not, by its

inaction, enlarge the power of the Court to decide a moot question. United States v. Alaska, 253 U.S. 113, 116 (1920).

Petitioner relies on this Court's decision in United States v. Sharpe, 470 U.S. 675, 681 n.2 (1985), for the proposition that an appeal is not rendered moot by a respondent's fugitive status. Mootness was not truly an issue in Sharpe, but was discussed because of a series of cases that held that a petitioner's fugitive status would be grounds for dismissing an appeal. The Court distinguished that line of cases from the situation in Sharpe, because denying review to a fugitive petitioner is "based on the equitable principle that a fugitive from justice is 'disentitled' to call upon this Court for a review of his conviction." Ibid. When the government is seeking review, the fugitive status of the respondent is irrelevant under this "equitable principle."

Respondent does not rely on an equitable principle, but on the doctrine of mootness. This case is distinguishable from those which involve the review of a final conviction. There is simply no live controversy for this Court to decide.

2. The Courts of Appeals do not clearly

disagree on the issue presented for review, and the cases cited by Petitioner can be distinguished on their facts from the present case. The First Circuit did not reach the question of the remedy for a violation of the time requirement of section 3142(f) in United States v. Vargas, 804 F.2d 157 (1st Cir. 1986). In Vargas, the court found that the defendant "had a timely opportunity to be heard on the issue of pretrial detention . . . ." Ibid at 162. The defendant challenged the adequacy of the detention hearing. The timeliness of the hearing was only challenged based on the defendant's assertion that he had not received an adequate hearing within the time period. Since the court found the hearing adequate, it found that defendant was afforded a timely hearing. The mention in Vargas of the de novo hearing curing the timeliness objection is therefore not a clear statement in conflict with the lower court's holding in the present case.

Neither has the Fourth Circuit ruled on the appropriate remedy for a violation of the time requirements of section 3142(f). In United States v. Clark, 865 F.2d 1433 (4th Cir. 1989), the court found that the defendants waived their right to a timely detention

hearing. In dicta, the court stated that "where the requirements of the Bail Reform Act are not properly met, automatic release is not the appropriate remedy." Ibid at 1436 (citing United States v. Hurtado, 779 F.2d 1467 (11th Cir. 1985)). Yet the court did not reach the question of what the appropriate remedy would be in such a case. The present case may distinguished further because Respondent was not automatically released. The court set stringent conditions on Respondent's release.

Finally, the Eleventh Circuit has only ambiguously addressed the remedy for an untimely detention hearing in United States v. Hurtado, 779 F.2d 1467 (11th Cir. 1985). In that case, the court found that the detention hearing was untimely, but without explanation, remanded for a de novo hearing under section 3142. The court relied on the Fifth Circuit's decision in United States v. O'Shaughnessy, 764 F.2d 1035, dism. on reh'g, 772 F.2d 112 (5th Cir. 1985), and the Ninth Circuit's decision in United States v. Al-Azzawy, 768 F.2d 1141 (9th Cir. 1985), which both stand for the proposition that a violation of the Bail Reform Act precludes the detention of the defendant. The result the court reached, without explanation, cannot be viewed as a

substantial conflict with the Tenth Circuit's opinion in the present case.

The present case presents such a bizarre fact situation that it is unlikely that a similar case will arise. Procedural errors such as the ones involved here are not bound to occur from time to time. The first error was that the government agents took Respondent to a distant jurisdiction before his first appearance in court. The second error was that the attorney for the government failed to inform the court or counsel for Respondent of the prior filing of a motion to detain until the week after it was filed in Chicago. The errors in this case can hardly be considered the fault of the magistrate. Nor can they be characterized as minor slips. No other court has considered such a blatant violation of the time requirements of section 3142(f).

3. The Tenth Circuit's decision was correct in finding that the only meaningful remedy for a violation of the time requirements of section 3142(f) was release on conditions. The Bail Reform Act does not set forth the remedy for a violation of the "first appearance" requirement because it is not necessary. The mandatory, unambiguous language of the statute states when the

detention hearing shall be held. Logic leads to the conclusion that a detention hearing may not be otherwise held. Congress clearly intended to insure prompt resolution of a person's pretrial detention. To allow a detention hearing at any time outside of the time limits set by Congress, would defeat the legislative intent of the statute. Petitioner suggests a standard of "the earliest practicable opportunity" for the holding of a detention hearing. Congress did not give the government or the court that freedom to decide what was practicable.

Petitioner's argument that Respondent was not prejudiced by the delay, because he would have been detained anyway, is specious.[3] The time restrictions in the Bail Reform Act were designed to protect everyone. Petitioner cannot argue that because Respondent was found to be a flight risk, he was not entitled to a timely detention hearing. A similar argument has been made with respect to the protection

---

[3] Petitioner's suggestion that Respondent suffered no prejudice because he somehow waived a prompt detention hearing is not really worthy of reply since the lower court found that there was no such waiver, and since counsel did object to the holding of the detention hearing.

of the Fourth Amendment, i.e., that it only protects the guilty. Professor Amsterdam revealed the fallacy of that argument:

> The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 403 (1974). The Tenth Circuit did not fashion an "excessive" or "blunderbuss" remedy for a violation of the time requirement of section 3142(f), but merely reached the only logical conclusion it could. The court of appeals chose to enforce the statute as Congress intended.

CONCLUSION

Petitioner seeks an advisory opinion from this Court as to the proper construction of the time requirements of the Bail Reform Act. In light of the fact that Respondent has violated the conditions of his release, it is inconceivable that he would not be detained if arrested. Since the Court's decision could

not possibly affect the future detention of Respondent, this case is moot and the petition should be denied.

There is no conflict in the courts of appeals on the issue of the remedy for a violation of the time requirements of section 3142(f). The Tenth Circuit's well-reasoned opinion should stand undisturbed.

Respectfully submitted,

BERNARD J. PANETTA, II
MARY STILLINGER
Attorneys for Respondent
CABALLERO, PANETTA & ORTEGA
521 Texas Avenue
El Paso, Texas 79901
(915) 544-0042

(3)

No. 89-163

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURRILLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANUM FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-163

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

---

1. The government seeks review of the court of appeals' ruling that a magistrate's failure to observe the "first appearance" requirement of the Bail Reform Act of 1984, 18 U.S.C. 3142(f) (Supp. V 1987), requires the pretrial release of a person who would otherwise be subject to pretrial detention. Respondent contends (Br. in Opp. 4-5) that this dispute is now moot because–contrary to his representations at the detention hearing–he did exactly what the government warned that he would do: once released, he immediately fled the jurisdiction to avoid prosecution. Far from establishing mootness, respondent's flight underscores the need for this Court to review the court of appeals' error.

Respondent argues (Br. in Opp. 4) that the government cannot seek review of the court of appeals' decision, but it

does "ha[ve] the option" of revoking his release. See 18 U.S.C. 3148 (Supp. V 1987). However, he offers no explanation why, if the government can pursue that remedy, it cannot seek review of the erroneous release order. If respondent were correct in asserting that the matter is moot, then *no* remedy would be available. In any event, the release order in this case cannot be revoked until respondent is rearrested. The Bail Reform Act's release revocation provisions specify that the government immediately may obtain a warrant for the fugitive's arrest, but they indicate that the revocation proceedings do not begin until the fugitive has been "brought before a judicial officer * * * for a proceeding in accordance with this section." 18 U.S.C. 3148 (Supp. V 1987). Thus, the Bail Reform Act's release revocation provisions, like the Act's provision of penalties for failure to appear (18 U.S.C. 3146 (Supp. V 1987)), do not provide a means of correcting the court of appeals' ruling.

Respondent also contends (Br. in Opp. 5) that the government's reliance on this Court's decision in *United States* v. *Sharpe*, 470 U.S. 675 (1985), is misplaced because "[m]ootness was not truly an issue in *Sharpe*." This Court's opinion in *Sharpe* indicates that respondent is incorrect. It unequivocally states that "respondents' fugitive status does not render this case moot" because "our reversal of the Court of Appeals' judgment may lead to reinstatement of respondents' convictions" (*id.* at 681 n.2). Similarly, this case is not moot because the Court's reversal of the court of appeals' decision would lead to imposition of a detention order.

2. Respondent additionally contends (Br. in Opp. 5-6) that this case does not warrant the Court's review because "[t]he Courts of Appeals do not clearly disagree on the issue." The court of appeals did not concur in that

assessment. See Pet. App. 13a ("circuit courts are divided in their conclusion as to what the remedy should be"). As we explained in our petition (at 11 & n.7), the First, Fourth, and Eleventh Circuits have all declined to follow the rule that the court applied in this case. See *United States* v. *Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc); *United States* v. *Vargas*, 804 F.2d 157, 162 (1st Cir. 1986); *United States* v. *Hurtado*, 779 F.2d 1467, 1481-1482 (11th Cir. 1985). Moreover, the issue has continuing and far-reaching importance. See Pet. 11-13.

3. Finally, respondent argues (Br. in Opp. 8-10) that the court of appeals' decision is correct. He acknowledges that the Bail Reform Act does not set forth the remedy for a violation of the "first appearance" requirement, but he contends that "[l]ogic" compels the court of appeals' result in this case. The consequence of respondents' "logic" is that a person who was arrested and charged with smuggling 72 pounds of cocaine across an international border was released from custody under conditions that the district court concluded would not "reasonably assure the appearance of the person as required and the safety of any other person and the community" (18 U.S.C. 3142(e) (Supp. V 1987)). See Pet. App. 16a. To no one's surprise, the person fled. We do not believe that the Bail Reform Act or any principle of "logic" requires that result.

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari, it is therefore respectfully submitted that the petition should be granted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00520

No. 89-163

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

BERNARD J. PANETTA, II
MARY STILLINGER
CABALLERO, PANETTA & ORTEGA
521 Texas Avenue
El Paso, Texas 79901
(915) 544-0042
Counsel for Respondent

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED JULY 28, 1989
CERTIORARI GRANTED OCTOBER 2, 1989

51pp

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-163

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

INDEX*

---

* The opinion and order of the district court and the opinion and judgment of the court of appeals were attached as appendices to the petition and are not reproduced herein.

INDEX – Continued

Chronological List of Relevant Docket Entries

A. United States District Court for the Northern District of Illinois

---

UNITED STATES OF AMERICA

v.

GUADALUPE MONTALVO-MURILLO

No. 89-CR-125 (N.D. Ill.)

PROCEEDINGS

02/10/89	Case assigned to MAGISTRATE GOTTSCHALL (Dkt'd 02/21/89). US Attorney CESAR – GARZA, THERESE added to case (Dkt'd 02/21/89).
1	Filed affidavit in removal proceedings (Rule 40) (Dkt'd 02/21/89).
	Defendant's first appearance (Dkt'd 02/21/89).
2	Defendant informed of rights (MAGISTRATE GOTTSCHALL) (Dkt'd 02/21/89).
2	Order appointing attorney GREEN, CANDICE to represent defendant (order appointing counsel attached) (MAGISTRATE GOTTSCHALL) (Dkt'd 02/21/89).

PROCEEDINGS

	2	Removal hearing waived (Defendant waives his right to identity hearing, bail hearing and probable cause hearing in this District. Defendant reserves his right to detention hearing and probable cause hearing in New Mexico.) (MAGISTRATE GOTTSCHALL) (Dkt'd 02/21/89).
	2	Order defendant removed to other district (Rule 40) 1084-2 (Order defendant removed to the U.S. District of New Mexico. Defendant ordered to be released to Federal Agents Richard Sanders and Ken Muir for transportation to New Mexico.) (MAGISTRATE GOTTSCHALL) (Dkt'd 02/21/89).
	3	Filed appearance of GREEN, CANDICE as attorney for defendant (Dkt'd 02/21/89).
03/02/89	5	Transmitted documents to 1084-2 (Las Cruces, New Mexico) (Dkt'd 03/02/89).
03/09/89	6	Filed return of transmittal Letter acknowledging receipt of documents on 3/7/89 at Las Cruces, New Mexico (Dkt'd 03/13/89).

Chronological List of Relevant Docket Entries

B. United States District Court for the District of New Mexico

---

UNITED STATES OF AMERICA

v.

GUADALUPE MONTALVO-MURILLO

No. CR-89-550 (D. N.M.)

MAGISTRATE PAPERS

2-10-89	Complaint Warrant for Arrest
2-16-89	Order of Temp. Det/ Pending Hearing Pursuant to Bail Reform Act Entry of Appearance by Bernard Panetta, II
2-21-89	Opposition by Deft of Detention Without Bond
*2-17-89	Motion by Govt. for Detention
2/21/89	Entry of Appearance of Angel Saenz as local counsel
3/7/89	Following paperwork rec'd from E/D of Illinois: 1. Cert Copy of Docket Sheet 2. AFFIDAVIT of Complaint/Indictment in Removal Procd 3. COMPLAINT 4. WARRANT FOR ARREST (JAD) 2/10/89

MAGISTRATE PAPERS

5. HEARING ON REMOVAL
6. ORDER APPOINTING FPD AS COUNSEL
7. APPEARANCES FILED BY ATTYS.

*2/21/89 DETENTION HRG before JAD. Counsel & deft & Interpreter present. Bond Set $50,000 Unsecured/3rd Pty Custody & co-signed by wife. $50,000 Bail Bond or $50,000 Cash also approved. USA given until 10:00 AM 2/22/89 to appeal.

2-22-89 NOTICE of Appeal (JAP) See reverse side of docket sheet.

PROCEEDINGS

2-17-89	1	INDICTMENT
2-21-89		ARRAIGNMENT. Counsel and deft present. Plea of NG. OHR and Motions by 3/6/89. Trial date not set, judge's office will notify. (JAD) Tape: 89-7B
2/22/89	2a	NOTICE OF APPEAL by Govt. of Motion for Revocation of Conds. of Rel.
2/23/89	2b	COURT IN SESSION: Bob Gorence for pltfs, Mary Stillinger for deft. Court will listen to tape when arrives from Illinois and notify counsel by telephone re: ruling. 10:36AM to 3:03PM Judge Parker reptr/Macia
3-1-89	3	ORDER SETTING CONDITIONS OF RELEASE – $88,500 property bonds secured by the execution and delivery of

PROCEEDINGS

mortgages of other legal instruments covering the unencumbered assets of deft and his wife. Deft and wife shall provide at their expense, information showing that the residence and 1984 Pontaic Firebird are unencumbered. 3rd Party w/restrs. (JAP and JAD)

4 MEMORANDUM OPINION AND ORDER – plaintiff appeal from the Magistrate's oral ruling that he would enter an order setting conditions of release is denied and Magistrate's proposed conditions of release, as amended in accordance with Memorandum Opinion and Order will be set forth in a separate order setting conditions of release, which will be entered by this Court. (JAP) EOD: 3-3-89 Copies by CO

3-2-89 5 MOTION by USA for Stay Pending Expedited Appeal

6 ORDER – the enforcement of the Memorandum Opinion and Order and the Order Setting Conditions of Release filed March 1, 1989 is stayed until 5:00 PM Thursday, March 9, 1989. (JAP) EOD: 3-3-89 Copies by CO

7 NOTICE OF APPEAL by USA from the Order of Release entered by the District Court on March 1, 1989.

Distribution of NOA as follows: (SPECIAL BAIL RECORD)

To Deft: Copy of NOA

PROCEEDINGS

To USCA: Copy of NOA, docket entries, desig ltr. and copy of Judgment
To Appellant: Copy of NOA, docket entries w/cert of desig attached; transcript order form, desig ltr (USCA form ltrs), and 10th Circuit Procedures.
To Appellee: Copy of NOA, 10th Circuit Procedures copy of docket entries w/cert of desig attached & desig ltr.
To Court Reporter: Copy of NOA, docket entries & desig ltr.
To Judge: Copy of NOA
To USM: Copy of NOA
To Probation: Copy of NOA
To Pretrial Services: Copy of NOA

3/6/89	8	ORDER that Gov't Motion for Stay Pending Expedited Appeal is granted. (JEC) EOD: 3/6/89 Copies by CO.
3/7/89	8A	TRANSCRIPT Order from Appellant ordering Transcripts of Detention Hrs before (JAD) 2/16/89 & 2/21/89 & Transcript of Initial & Waiver of Removal Hrg before Magistrate Gottshall.
3/10/89	9	NOTICE by appellant or ordering transcript. lc
3/13/89	10	NOTICE by Rptr est. completion date 3/15/89.
3/13/89	11	COPY ORDER from USCA record & transcripts be prepared & transmitted by Clerk of DC no later than 3/17/89.

PROCEEDINGS

3/17/89	12	NOTICE by rptr transcripts completed 3/17/89 & filed w/Clerk's Office. lc
*3/13/89		TRANSCRIPT of Detention Hrg of 2/16/89 before (JAD) received.
*3/13/89		TRANSCRIPT of Initial & Waiver of Removal Hrg on 2/10/89 received.
*3/13/89		TRANSCRIPT of Detention Hrg on 2/21/89 received.
3/17/89		TRANSCRIPT of Proceedings of Appeal from Detention Order received (original & one)
3/17/89		RECORD ON APPEAL re: Special Bail in five volumes mailed to USCA (copies only). lc
4/17/89	13	MOTION by deft to allow deft to file pre-trial motions. lc
4/17/89	14	MOTION by deft for Continuance. lc
4/18/89	15	ORDER motion of deft file pretrial motions granted: Court will accept & consider deft's pretrial motions, notwithstanding fact that more than ten days have elapsed since deft arraigned (JEC) Distr by C/O.
4/18/89	16	ORDER deft's Motion for Continuance granted; cause rescheduled for June 1989 docket; period of time from 4/14/89 to June 1, 1989 is excludable time within meaning of Speedy Trial act. (JEC) EOD: 4/18/89 Distr by C/O.
4/18/89	17	MOTION by deft to Suppress.
	18	MEMO of Law support Motion to Suppress. lc
4/25/89	19	RESPONSE by Govt. to Motion to Suppress. ds

PROCEEDINGS

*3/27/89		RECEIPT acknowledged by USCA of Record on Appeal on 3/23/89 1c
5/18/89	20	CC Order from USCA, order of UCSA staying USDC order entered 3/1/89, is vacated; deft shall be released forthwith, with terms provided in District Court's order of 3/1/89. (Hoecker)
5/22/89	21	ORDER Set conds of Rel. $88,500.00 (bond) PROPERTY BOND 3rd pty custody: Elisa Madrigal Salgado 2000 Lake Huron El Paso, Texas (855-8099) Deft: same address
5/22/89	22	AGREEMENT to Forefeit Property. (SEC)
5/22/89	23	APPEARANCE BOND sum of $88,500. Deed to Residence & Certificate of Title (1984) (Pontiac Firebird.
5/22/89	24	WAIVER of Homestead.
5/22/89	25	AFFIDAVIT of Guadalupe Montalvo-Murillo.
5/22/89	26	AFFIDAVIT of Elisa Salgado Montalvo.
5/22/89	27	THE FOLLOWING ENCLOSED IN SEALED ENVELOPE TO PROTECT DOCUMENTS: Original Certificate of Title of Vehicle 1984 Firebird Special Warranty Deed – Property 2000 Lake Huron, El Paso, Texas Warranty Deed El Paso Central Appraisal District of Real Property First American Title Ins. Co.

PROCEEDINGS

		Letter from Ticor Title Ins. to Mr. Lalo Ortiz re: Property 2000 Lake Huron, El Paso, Texas
5/24/89		NOTE from Judge Parker's office re: Memo Opinion & Order dated March 1, 1989 for publication.
5/30/89		*Memo opinion & order dated 3/1/89 sent for publication.
6/20/89	28	PETITION for Action on Conditions of Pretrial Release – Order that a warrant be issued for Deft to show cause why his conds. should not be revoked. (SGB)
6/9/89		Warrant issued by Judge Buell for violation of conds. of release.
6/27/89	29	CC of Judgment and Opinion from USCA, 10th Circuit, which constitutes the mandate of this Court AFFIRMING the decision of the District Court Ordering the release of the Deft. ds
7/7/89	30	GOVT'S REQUESTED JURY INSTRUCTIONS. DS
7/10/89	31	8:15 a.m. COURT IN SESSION. Counsel Mary Stillenger for Deft. and Robert Gorence for Govt. present. Deft. not present. Govt. mores to forfeit bond and seize the house. Ct. asks Govt. to prepare Order granting forfeiture. 8:18 a.m. COURT IN RECESS. (JEC) Rptr. Harris
7/12/89	32	NOTICE and Motion by Govt. to Forfeit Bond and Enter Judgment. ds
7/17/89	33	ORDER that the Hrg. on Gov't Motion for Forfeiture of Bond is set for

PROCEEDINGS

		7/21/89 at 8:00 a.m. before Judge Conway. (JEC) EOD: 7/18/89 Copies by JO and CO. ds
7/21/89	34	CLERK'S MINUTES: –GOVT'S MOTION FOR FOREFEITURE. 8:00 A.M. In Session Court allows forefeiture, Govt. to prepare order. 8:05 A.M. Recess. Pres Torres to USA Mary Stillinger for Deft. (JEC) Rptr: Julie for B. Harris.
8/1/89	35	JUDGMENT–ORDER that Deft's bond in the amt of $88,500 secured by deft's residence be forfeited and USA have judgment against Deft. of 2000 Lake Huron, El Paso, TX 79936 in the amt. of $88,500.00 (JEC) EOD: 8/1/89 Copies by CO. ds
8/17/89	36	ORDER that Deft's Motion to Suppress is held in abeyance until such time as deft. is no longer a fugitive. An evidentiary hearing will be held at that time. (JEC) EOD: 8/17/89 Copies by CO ds

Chronological List of Relevant Docket Entries

C. United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA

v.

GUADALUPE MONTALVO-MURILLO

No. 89-2056 (10th Cir.)

PROCEEDINGS

3/8/89	1	[332689] Criminal case docketed. Preliminary record filed. (kmh)
3/8/89	2	[332691] Appellant's motion filed by Appellant USA for stay of defendant's release on bail. 89-2056]. Original and 3 copies c/s: y (kmh)
3/9/89	4	[332991] Appellant's motion(s) Appelland/Petitioner motion for stay of release on bail submitted to panel. (kmh)
3/9/89	5	[332999] Order filed by Judge(s) Moore, Anderson, Tacha-response to motion for stay (simultaneous memo briefs) due 3/16/89 for Guadalupe Montalvo-Murillo, for USA, Reply briefs, if any, shall be filed no later than 3/21/89 at 5:00 P.M.–Record on Appeal due (shall be transmitted no later than 3/17/89) for James A. Parker pursuant

		to Rule 11.1., directing that transcript be filed by 3/17/89 for Charlotte Macias (kmh)
3/9/89	6	[333033] Order filed Judge(s) Moore, Anderson, Tacha granting Appellant/ Petitioner motion for stay of defendant's release on bail pending further order of this court. [332691-1] (kmh)
3/13/89	10	Acknowledgement of transcript order filed by USA. (kmh)
3/13/89	11	[335031] Designation of record filed by Appellant USA. Original and n/a copies. [89-2056] Appellee's designation of record due 3/27/89 for Guadalupe Montalvo-Murillo (kmh)
3/16/89	7	[334729] Appellee's response filed by Montalvo-Murillo. Original and 3 copies. c/s: y (kmh)
3/16/89	8	[334745] Appellant's response filed by USA Original and 4 copies. c/s: y (kmh)
3/21/89	13	[335564] Appellee's reply brief filed by Guadalupe Montalvo-Murillo. Original and 3 copies. c/s: y (kas)
3/23/89	15	[336156] Special bail record on appeal filed: 5 Volume(s)—Copy filed in Volume(s) (y/n): n. Volume I (pleadings) Volumes II through V (transcript). (kmh)
3/23/89	17	[336176] Transcript order form filed by Charlotte Macias William L. Lutz, Robert J. Gorence. (kmh)

5/3/89		[345731] Case submitted to panel on the briefs pursuant to Rule 34. Moore, Anderson, Tacha (kas)
5/11/89	19	[347633] Appellee's motion to vacate stay of district court order. filed by Guadalupe Montalvo-Murillo. Original and 3 copies. c/s: y (kmh)
5/15/89	21	[34258] Appellee's motion(s) Appellee/ Respondent motion to vacate stay submitted to panel. (kmh)
5/16/89	22	[348265] Order filed by Judge(s) Moore, Anderson, Tacha granting Appellee/ Respondent motion to vacate the order of this court of 3/9/89 staying the U.S.D.C for the D. of NM entered 3/1/89. Defendant is to be released forthwith in accordance with the terms provi[d]ed in the district court's order of 3/1/89. [347633-1] (kmh)
5/31/89	23	[351217] Published per curiam opinion filed by Moore, Anderson, Tacha, judgment affirmed. [89-2056] (kmh)
6/22/89	25	[346213] Mandate issued. Mandate receipt due 7/24/89 Record on appeal return due 10/20/89 (kas)
6/29/89	26	[358580] Mandate receipt filed. (tc)
10/6/89	27	[381373] Supreme Court order dated 10/2/89 granting certiorari filed. (afw)

Transcript of Initial and Waiver of Removal Hearing
(N.D. Ill. Feb. 10, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

89-CR-125

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

GUADALUPE MONTALVO-MURRILLO, DEFENDANT

INITIAL & WAIVER OF REMOVAL HEARING

BE IT REMEMBERED that on to-wit, the tenth day of February, 1989, the above-entitled matter came on for hearing before the HONORABLE UNITED STATES MAGISTRATE GOTTSHALL, sitting in open court in Illinois.

APPEARANCES

FOR THE PLAINTIFF:
MS. THERESA GARZA
United States Attorney

FOR THE DEFENDANT:
MS. CANDICE GREEN
Attorney at Law

THE INTERPRETER:
MR. ROBERTO MENDOZA

• • • • •

[2] COURT CLERK: 89-CR-125, United States of America versus Guadalupe Montalvo-Murrillo.

MS. GARZA: Good afternoon. Theresa Garza, on behalf of the United States.

MS. GREEN: Good afternoon, Your Honor. Candice Green on behalf of Mr. Murrillo, present in Court with the assistance of an interpreter, Roberto Mendoza.

THE COURT: It's Mr. Murrillo, is that correct?

THE INTERPRETER: Yes.

THE COURT: So the purpose of this proceeding is to advise you of the charge against you and to advise your rights and discuss the question of bond. You will not be [3] asked to say anything today about what you did or did not do in connection with this charge.

Now, you have a right to counsel, to an attorney, at every important stage of the proceedings, including the proceeding today. And if you cannot afford to hire a lawyer, the Court will appoint a free lawyer for you, if you wish. But you also have a right to hire a lawyer of your choice if you have the means to do that, and you have a right to represent yourself.

Whatever you choose, you have the right to consult with your lawyer and to have the assistance of your lawyer at any time that any agent or authority of the government seeks to question you.

Do you under those rights?

THE INTERPRETER: Yes.

THE COURT: I take it that Mr. Murrillo doesn't have his own lawyer with him today?

MS. GREEN: That's correct, Judge.

THE COURT: He has not filled out a financial affidavit yet?

MS. GREEN: He has not, Your Honor. I just assumed, because it was a remove [*sic*] proceeding, that he would most likely be getting an appointed attorney down (inaudible).

THE COURT: Mr. Murrillo, would you like me to appoint counsel for you just for purposes of this hearing today?

[4] THE INTERPRETER: Yes.

THE COURT: All right. What is the nature of the charge in this case?

MS. GARZA: Your Honor, the defendant is charged in the District of New Mexico with violations of 841—Title 21 841 subsection (a)(1) and 841 subsection (b)(1), and we are here on a removal complaint, Your Honor.

THE COURT: So, Mr. Murrillo, you are charged with an offense in the District Court in New Mexico and the purpose of this proceeding is to determine whether you should be sent to New Mexico to deal with the charge. Do you understand that?

THE INTERPRETER: Yes.

THE COURT: All right. Now, I understand that counsel has reached some kind of agreement respecting bond in this case?

MS. GARZA: That's correct, Your Honor. As I indicated, we are here on a removal proceeding and the government was going to move for detention, however, after having consulted with Ms. Candice Green, we have determined that we can come to the agreement that if the defendant were immediately removed from our district and taken to the charging district; that is, the District of New Mexico, that we would not hold the detention hearing here and they would waive their right at this point and, however, not waive any rights to [5] preliminary hearings or detention hearings in that district.

THE COURT: There is no indictment in this case, is that right? It's a complaint?

MS. GARZA: No, it's a complaint, Your Honor. The defendant was just arrested in New Mexico.

THE COURT: All right.

MS. GARZA: And he had flown to our district because there was an attempt at some cooperation effort. He was arrested in New Mexico and he is just being brought before you based on that.

THE COURT: Oh, all right.

MS. GREEN: That's correct, Your Honor. We would waive any issue of identity at this point and also reserve the right to a preliminary hearing down in New Mexico and also a bond review down in New Mexico—New Mexico.

THE COURT: But bond was set earlier in New Mexico? Is that what happened?

MS. GARZA: No. That is not correct, Your Honor.

THE COURT: Oh, Mr. Murrillo was in custody?

MS. GREEN: I believe he was in custody and they transported him directly here.

MS. GARZA: That's correct. He was arrested and agreed to cooperate and was transported here.

THE COURT: Okay. Have to think this through a minute. This is different from anything I ever heard of before.

[6] All right. I guess I don't see any—Mr. Murrillo isn't here because he just happened to be here? He's here—

MS. GARZA: Yes, Your Honor. It's a little bit of a unique situation, but, nonetheless, I think the removal proceeding is the applicable one. He was arrested for an offense—

THE COURT: I understand.

MS. GARZA: —in New Mexico and transported here only for the purpose of his cooperating in the delivery of the narcotics.

THE COURT: All right.

Mr. Murrillo, it's the government's position, and the case is somewhat unusual, but I think it's probably more protective of your rights than proceeding any other way,

but before you can be sent back to New Mexico, you are entitled to a probable cause determination in this Court; that is, a determination of whether there's probable cause to believe that you committed an offense.

Your are entitled to a determination of whether you are the person named in the complaint, and you are entitled to a hearing on the question of whether bond should be set or whether you should be out on custody.

Now, my understanding is that Ms. Green, who is representing you for purposes of these proceedings, and the [7] government have agreed that the best way to deal with the case is simply to have you sent back to New Mexico, to waive your right to have the issue of identity and probable cause determined here, and to have the Court in New Mexico rule on the bond question—on the bail question.

Is that agreeable to you?

MS. GREEN: As well as on a preliminary—we are not waiving preliminary—

THE COURT: You are not waiving—

MS. GREEN: That's right.

THE COURT: —waiving preliminary examination?

You are only basically entering into an agreement which will have the Court in New Mexico, rather than the Court here, make that probable cause determination?

MS. GARZA: That's correct, Your Honor.

THE COURT: Is that acceptable?

THE INTERPRETER: Yes. They want me to, I am with them.

THE COURT: All right. I—you have talked to Ms. Green about it? You have had some chance to consult, is that right?

THE INTERPRETER: Yes.

She is this lady, right?

THE COURT: Yes. Yes.

THE INTERPRETER: Yes.

THE COURT: All right. Then we will enter an order of [8] removal specifically reserving the issues of intention [*sic*] detention and probable cause for determination by the District Court in New Mexico, and I take it Mr. Murrillo is going to be transported promptly, is that right?

MS. GARZA: He is going to be transported late this afternoon, Your Honor, and we would ask also that if it—if the United States Marshals require that an order be entered, that he can be released to the custody of Richard Sanders and Agent Ken Muir. Agent Sanders is from the DEA in New Mexico, in the District of New Mexico, and Ken Muir is a customs agent—customs agent from New Mexico, and that he be released in their custody for transporting him to New Mexico.

THE COURT: All right. It will be so ordered.

MS. GREEN: Thank you very much.

THE COURT: Court stands—

(THEREUPON, the proceedings were in recess.)

Transcript of Detention Hearing
(D. N.M. Feb. 16, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

89-CR-550

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

GUADALUPE MONTALVO-MURRILLO, DEFENDANT

DETENTION HEARING

BE IT REMEMBERED that on to-wit, the sixteenth day of February, 1989, the above-entitled matter came on for hearing before the HONORABLE UNITED STATES MAGISTRATE JOHN DARDEN, sitting in open court at Las Cruces, New Mexico.

APPEARANCES

FOR THE PLAINTIFF:
Assistant United States Attorney

FOR THE DEFENDANT:
MS. MARY STILLINGER
MR. DONALD HILL-SAINZE
Attorneys at Law

* * * * *

[2] THE COURT: The next matter is Guadalupe Montalvo-Murrillo.

MS. STILLINGER: Your Honor, my name is Mary Stillinger. I am with the firm of Caballero, Patello & Ortega, El Paso, Texas.

Mr. Bernard Panetta was hired by the defendant's family about three hours ago.

This is Don Hill-Sainze. He was appointed by the Court.

MR. HILL-SAINZE: I am now acting as local counsel.

THE COURT: And you agreed, Don Hill-Sainze, to go ahead and serve as local counsel? They are going to make arrangements with you to do that?

MR. HILL-SAINZE: Yes, it will be done.

[3] This defendant, do we have any report from the Pretrial Services Office?

MS. STILLINGER: Hum-um.

AUSA: No, Your Honor.

MS. STILLINGER: Your Honor, if we could, I would like—I haven't seen the government's motion to detain.

THE COURT: Let me ask, what is the status of this? I have not had this gentleman before (inaudible)—to Illinois from (inaudible.)

MR. HILL-SAINZE: To the nearest available—(inaudible).

THE COURT: All right.

My name is John Darden, before you as US Magistrate for the US District of New Mexico. Federal law requires that I advise of you of your federal rights.

I have before me a complaint charged by the—signed by Mr. Hughes, in front of me, that you did on or about February 8, 1989 in Otero County, New Mexico, knowingly and intentionally possess with intent to distribute approximately seventy-two pounds of cocaine, a Schedule II narcotic controlled substance.

The maximum punishment—get to it real fast—maximum punishment if you are found guilty of these charges is up to the minimum of ten years in jail, up to life imprisonment and four-million-dollar fine, and if you are [4] imprisonment and four-million-dollar fine [*sic*], and if you are released from jail you have a minimum of five years of supervised release. This is the worst that can happen to you. As you can tell, it is very severe.

You have the right to employ your own attorney. If you are unable to afford counsel, you have the right to request that I appoint counsel for you, once Mr. Hill-Sainze has filed his appearance, you do not have to—until you have to proceed before the district judge, Don Hill-Sainze, you won't have to come back and traipse in before me, if that's convenient with you. However, Mr. Sainze is on the docket as far as notices in this court.

Since you do have counsel entered, I am required by the district judge to notify counsel that the district judge, Judge Conway, intends each of you—and the US Attorney is also here—to abide by Rules 9(b) 9(c) and Rule 9—Rule 11. He also will enter a discovery order shortly that will determine the discovery process.

You have the right to remain silent. Anything which you say may be used against you in the courts. You are not going to be asked to plead at this time, but if at any time you are asked to plead, I suggest you discuss this matter with your attorney and enter only a not guilty plea.

If you make a statement or if you are asked to make a statement at this point (inaudible) that you chose to [5] do so, you may terminate the statement and your decision to stop talking may not at any time be used against you in court.

With respect to the detention and release of the defendant, it's my understanding the Pretrial Services officer now has not conducted a report, is that correct?

AUSA: (Inaudible.)

THE COURT: All right. I think, therefore, in the interest of judgment [*sic*], that I should continue the detention hearing for a maximum of three working days, as the United States wishes to request. The detention and motion for detention will need to be filed. Otherwise, I will review the conditions of release and consider those within three working days.

MS. STILLINGER: Your Honor, it's my understanding that the government is required to move for detention in Chicago where he had his initial appearance. I think he waived his identity hearing, but I don't believe he waived the detention hearing at that point.

THE COURT: Well, that's a matter we will have to take up—you can take up with the district judge if you want to. As far as I am concerned at this time I am going to temporarily deny bail for a maximum of three working days and hopefully we may be able to come—when is next Monday?—Monday—

[6] AUSA: Monday is a holiday.

THE COURT: So on Tuesday we will have a detention hearing. I encourage you to furnish as much information as possible to the Pretrial Services officer. I do value the resources of their office.

Thank you.

AUSA: Thank you, Your Honor.

THE COURT: Defendant is remanded to the United States Marshal during this period of time.

(THEREUPON, the proceedings were concluded.)

Transcript of Detention Hearing
(D. N.M. Feb. 21, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

89-CR-550

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

GUADALUPE MONTALVO-MURRILLO, DEFENDANT

DETENTION HEARING

BE IT REMEMBERED that on to-wit, the twenty-first day of February, 1989, the above-entitled matter came on for hearing before the HONORABLE UNITED STATES MAGISTRATE JOHN DARDEN, sitting in open court at Las Cruces, New Mexico.

APPEARANCES

FOR THE PLAINTIFF:
MR. WILLIAM L. LUTZ
United States Attorney
United States Courthouse
500 Gold Avenue, Southwest
Albuquerque, New Mexico 87102
By: Ms. Paula Burnett

FOR THE DEFENDANT:
MR. NETHERWOOD
Attorney at Law

ALSO PRESENT:
MR. HUGHES

* * * * *

[2] THE COURT: We are proceeding now in criminal docket number 89-550 (inaudible), of this court, which is United States of America versus Guadalupe Montalvo-Murrillo.

We have a motion for detention filed by the Assistant United States Attorney Gorence. Opposition to that is filed by the defendant.

All the witnesses who are going to testify in the motion for detention, please raise your right hand.

(THEREUPON, the witnesses were duly sworn.)

THE COURT: Where is your translator? We will have to wait a moment until the translator comes. You have an [3] interpreter from the Pretrial Services Office?

I am going to take judicial notice of Pretrial Services officer and, therefore, I require that no testimony (inaudible) that the information that is before me be presented. However, you may present information supplemental, if it disagrees with it.

Now, we do want to wait, I guess, until we can find our translator, so we will be in recess for just a moment.

(THEREUPON, the proceedings were in recess.)

THE COURT: We have a motion for detention by the United States. Call your first witness.

MS. BURNETT: The government at this time would rely on two things that I would indicate to the Court. The first is that Guadalupe Montalvo-Murrillo has been indicted. I do not know if the Court is aware of that or has received a copy of that, but that is the first thing I would like to present to the Court. I do not have a certified copy, but I do have a copy if the Court would like to view that.

THE COURT: The clerk advised me that she does have a certified copy in her file.

MS. BURNETT: And the second thing I would do is just indicate to the Court that the indictment cites in excess of five kilograms of cocaine; that under the detention

guidelines that the burden of proof is upon the defendant to [4] prove that he is not a flight risk or otherwise a danger to the community.

And other than that, I would rely on the information that has been provided by the Pretrial Division that the Court has taken–

THE COURT: All right. I am taking judicial notice of the Pretrial Services report dated 2/21/89.

All right. For the defendant, you call your first witness.

MR. NETHERWOOD: Your Honor, we would like to supplement the report with information sought to tender to Mr. Rosa, but he was otherwise occupied in the day.

THE COURT: All right. (Inaudible.)

What is the proffer if you would, please?

MR. NETHERWOOD: If we were to put on testimony of these documents, that testimony would be that Mr. Montalvo was thirty-one years of age. He was born in Zacatecas, Mexico, and came to the United States in 1975 and obtained his permanent resident status in 1978.

The government, I believe, has the green card, the permanent residence card that was seized from him on the day of his arrest, which would show that he has been a lawful resident of the United States since 1978.

He obtained that in Chicago, Illinois, where he worked from 1975 to 1987. He worked at a company called [5] American Electric Cord Sets. We would tender to the Court the W-2's of Mr. Montalvo from American Electric Cord Sets for the year 1985 and 1986. We were not able to obtain any other facts than that.

THE COURT: What is the name of the employer again? Called American Electric Cord Sets?

MR. NETHERWOOD: American Electric Cord Sets.

THE COURT: Bensenville, Illinois?

MR. NETHERWOOD: Location of the company was at 1065 Sesame Street, Bensenville, Illinois, Mr. Montalvo

in 1985 lived at 10,500 Crown Road, Franklin Park, Illinois, and 1986, 10,500 Crown Road, Franklin Park, Illinois.

THE COURT: His residency in 1987 is–

MR. NETHERWOOD: His residence in 1987 was in Mexico. In 1988 it is in the United States. So from 1975 to 1988 he has resided in the United States, except for one year when he resided in Mexico.

THE COURT: And where did he live in 1988? In El Paso?

MR. NETHERWOOD: In 1988, Your Honor, he resides at 2000 Lake Herron, El Paso, Texas. I would tender to the Court payments to the tax assessor, receipts from the tax assessor collector, receipts received by his wife, Alicia Madrigal-Salgado, the insurance policy on the house in the name of Alicia Madrigal-Salgado, El Paso Electric Company utility bills for the past six months, which we were able to [6] locate in the name of Guadalupe Montalvo-Murrillo for 2000 Lake Herron, the Southern Union Gas Company bills in Mr. Montalvo's name, 2000–

THE COURT: Any objection to that–

MR. NETHERWOOD: Herron.

THE COURT: –from the US with respect to the proof at this point?

MS. BURNETT: No, Your Honor.

THE COURT: With no objection the proffer will be received.

Do you have anything else to present by proffer?

MR. NETHERWOOD: Yes, Your Honor, to demonstrate to Your Honor that, in fact, Alicia Madrigal-Salgado is the wife of Mr. Montalvo, we have the marriage license from Franklin Park, Illinois, where they were married, tender that to the Court.

They were (inaudible) married at that time in a civil service in Mexico. I have not had an opportunity to get a translation of that document. I would request permission to submit the Spanish at a later date – submit the certified copy of the translation of that Spanish document.

THE COURT: That will be satisfactory.

Somebody around here speaks English?

MR. NETHERWOOD: We have two English marriage [7] certificates.

In addition to Mr. Montalvo being a lawful resident of the United States, his children are US citizens. His first son, Guadalupe Montalvo, Junior, was born May 25, 1981, West Lake, Community Hospital, in (inaudible) Park, Illinois, and tender copy of the birth certificate to the Court.

His second son, Eric Montalvo, was born August 27th, 1984, West Lake Community Hospital, (inaudible), Illinois. Tender that to the Court.

His third child, Alicia Montalvo, was born in El Paso, Texas, on November 13th 1987. His two older children – all of his children live with him and his wife at their home in El Paso, Texas. And his two older children attend school in El Paso, Texas.

Mr. Montalvo, as I say, worked for fourteen years.

THE COURT: Let's deal with the proffer that you presented dealing with that period of time.

Is there any objection to that portion of the proffer relating to his family background?

MS. BURNETT: I have no objection, Your Honor. I would like to look at the documents, but I don't believe (inaudible).

THE COURT: Proffer will be received subject to any rebuttal by the government.

[8] MR. NETHERWOOD: Documents showing that Mr. Montalvo, in 1987, purchased a home and two businesses in Mexico. The money used for the purchase of that came from his employment in the United States. He subsequently sold that home, used those funds for the purchase of his house in the United States.

Again, I would request permission to submit the Spanish and we would offer a certified translation of this when we have an opportunity.

Assets which are set forth in the Pretrial Services report (inaudible) show Mr. Montalvo owned the property in the United States; that is, his home. He has his family living here. In addition to his wife and three children, he has an uncle that resides in California. He has, I believe it is two uncles or three uncles, three cousins and three aunts that reside in the Chicago, Illinois, area.

THE COURT: All right.

MR. NETHERWOOD: I respectfully submit that based on that, (inaudible) in this case is appropriate, but before we even get to that we have filed in opposition to government's motion to detain.

THE COURT: All right. And I have this right here.

Now, Mr. Netherwood, what we need to is do is have the US Attorney out of here in sixteen minutes, so I need you [9] to go ahead and, to the extent that you can, through some of your witnesses present their evidence through proffer and the government to the extent we need to get her out. The district judge has commanded her presence at one thirty.

To the extent you can, let's agree to what we can and leave the rest to (inaudible), the evidence is in, so as to your – as to each witness, I would like for you to identify your witness now and proceed to tell me, if you wish, what you can proffer that this witness will testify and if we can get it agreed to, fine. The witness would not have to testify. If not, the witness can go ahead and be subject to cross examination.

MS. BURNETT: Mr. Montalvo would testify as to the proffers that we have made, his employment, his family history, hs marital status, his employment history, where he now lives, which essentially would be confirming that those documents do relate to him and, in fact, his work in places where it says he has worked and he has lived in places where the documents demonstrate that he lives.

THE COURT: Would you accept that?

MS. BURNETT: As to these documents, I would have no objection. I would request copies of them, if those are acceptable, and we will stipulate that testimony at this point.

THE COURT: That's fine. I do have a question for Mr. [10] Montalvo, and that is—as relates to your proffer, and that is, you have indicated he lived in the United States in 1988. The address in the Pretrial Services report indicates that he lived at that address on Lake Herron only five months, and I would like to know where he lived the duration of 1988.

I read your words (inaudible) I don't want him to answer unless his attorney authorizes it to, but—

MS. BURNETT: I will produce—you know, we have the copy of the deed. I believe the home was purchased in May of 1988, and I will request permission to supplement the record by furnishing that document to the Court.

THE COURT: All right. Your request—in any event, if the defendant is released, I am going to request proof of ownership of the property, and in a form satisfactory to the US Attorney, which the US Attorney's Office previously has regulations on file with the US District Clerk which do require a certified copy of the instrument, so that one way or the other he would have to prove his ownership.

Go ahead and proceed with your next witness, then.

MS. BURNETT: That's the testimony that we would have.

THE COURT: The other witnesses I saw testifying with their hand up were—

MS. BURNETT: An agent for the government.

THE COURT: I thought I saw more than one.

MS. BURNETT: I believe only one agent would have—I [11] would not call him subject to the acceptance by the Court of the report by Pretrial.

THE COURT: He would be just repetitious to that.

MS. BURNETT: Yes.

MR. NETHERWOOD: We would like for that agent or through whoever has it, put into evidence a copy of Mr. Montalvo's resident alien card which was taken from him at the time of the arrest. It's not in our possession. The government has it.

MS. BURNETT: I don't believe that Mr.—that it is in presently Mr. Hughes' possession, but we would stipulate that it does, in fact exist, and he had his green card dating from 1979, is that correct?

MR. NETHERWOOD: The temporary card.

MS. BURNETT: Temporary, so we would stipulate it did, in fact, exist and was seized by the government upon arrest.

THE COURT: All right. I think another factor initially agreed to, and that is to move this thing on the allegations in the (inaudible), and I am going to indicate that on February (inaudible) '89, I issued an arrest warrant for the defendant; that he was taken to the Northern District of Illinois.

And I don't know—Ms. Burnett, just for the purposes of this record, when was he returned to New Mexico? I want to be quite clear that I am not going to rule on the—[12] I am going to leave it up to the district judge to rule on

the issue of the appropriateness of the—what was done and whether I am correct in entering a detention order.

It is my intention to order a detention order or order for release, one or the other, and let you raise the issue with the district judge who has this case, as to the appropriateness of the action of the government.

So, therefore, I would like to get as a matter of record before this court what we know; that the defendant was arrested on or about February 8, 1989. He was taken on that date to the Chicago, Illinois area and apparently he was not brought before a United States Magistrate until on or about February 16, 1989, at which time I continued the detention hearing over the objection—let's see—over the objection of the defendant, and it was set for today.

And at this point in time we are here for court and I will make note—am I correct on that information?

MS. BURNETT: Yes, Your Honor. The only item that I would add, which I have no reason to know and I believe it is alluded to in the motions, however, that he did actually appear in front of a magistrate in Illinois. I do not know the date of that, but I believe Mr. Hughes could produce that date.

THE COURT: Mr. Hughes, when is that?

MR. HUGHES: I believe some (inaudible) probably Friday, [13] February 10th.

THE COURT: All right. In Illinois?

MR. HUGHES: Yes, sir.

MS. BURNETT: And this is based, Your Honor, upon the arrest warrant that was issued from this court as to his appearance in Illinois.

THE COURT: I have a copy of a document that is unsigned that indicates something that is dated February 10, 1989. I just want to make sure the record is correct, and I will take judicial notice of those facts.

Is there anything that you wish to supplement that with, Mr.—

MS. STILLINGER: Yes, sir, Your Honor. Your Honor stated that February 16th the detention hearing was continued. I would like the record to show I believe the government did not move for pretrial detention of the defendant in this case until February 17th, 1989. And I would ask the Court to take judicial notice of file in this case.

I have a copy of the government's motion to detain which was filed September—excuse me, February 17th, 1989—

THE COURT: That's fine.

MS. STILLINGER: —the day after Mr. Montalvo's appearance in this district and the apprehension, of 18 USC 3142: "The hearing shall be held immediately upon the person's first appearance."

[14] And I invite the Court's attention to the cases that we have cited, and there is even one case on (inaudible) that is filed two days untimely. The rule says what it says, an individual cannot be detained without bond absent the government moving at the initial appearance.

They have not done so and we effectively submit that this Court may not detain this individual without bond.

THE COURT: Excuse me. Part of your comment was proffer and part of it was argument. With respect to the factor that—the fact that you have asked me to take judicial notice of the witness—that the defendant—that the US Attorney did not at the time of the initial appearance before myself request detention of the defendant, the Court will take judicial notice of that fact.

At the commencement of the detention hearing it is my recollection the record will reflect that I immediately continued that phase of the initial appearance and continued it for a maximum of three working days.

All right.

MS. BURNETT: If I may briefly supplement that, if this is the record of the Court, that at that time the US Attorney's Office was given a period of time within which to file the motion and that, in fact, occurred on February 17th.

THE COURT: As it stands now, you are going to have a hearing de novo the loser, I suppose, if you wish, before [15] the US District Court. This—the following will be the order of release of this defendant (inaudible) effective—and you have a hearing today, Ms. Burnett?

MS. BURNETT: Yes, Your Honor.

THE COURT: It will not be effective until ten AM tomorrow because the US Attorney's lack of office respects in Las Cruces at this time and office staff in order to file notice of appeal, if it wishes to. If it does not wish to file notice of appeal by that time, the defendant in all other respects, has complied with the order of release then and can go.

It is ordered the defendant's release be subject to the following conditions: He shall not commit any offense in violation of federal, state, or local law while on release in this case. He shall advise the Court immediately, including defense counsel and US Attorney, in writing prior to any change in address and telephone number. He shall appear at all proceedings as required and shall surrender for any sentence imposed as directed.

Now, I am depending upon the fact that the defendant owns his house free and clear, and it has a value of approximately eighty-five thousand dollars, and I am going to set a fifty-thousand-dollar bond to be secured by the following: One, the co-signature of a spouse and a deed of trust in a form approved by the US Attorney's Office securing [16] that house, signed by himself and his spouse.

Part of the requirements are going to be to prove that he does, in fact, own the house. There are procedures before the US Attorneys. The US Attorneys file with the district clerk how to prove ownership and how to prove value, and I am presuming the value of approximately eighty-five thousand and give or take five thousand.

I can hold him to that exact amount, but—and that there should be equity of approximately fifty thousand dollars, given the homestead exemption that he and his spouse would have under the laws of the State of Texas.

In the alternative, a bail bond or deposit of cash would be sufficient, so you don't have to come back to me if you are having problems with that.

The defendant is ordered placed on third-party custody of his spouse, who must agree to supervise him in accordance with the conditions of release, use every effort to assure his appearance at all Court proceedings and notify the Court immediately in event he violates any condition of release and disappears.

I find that the above conditions that I have set will not assure his appearance in Court or the safety of the community without these conditions of third-party custody, and in addition during his release he shall maintain or actively seek employment or in the alternative, maintain or [17] commence an educational program.

His travel is restricted to the El Paso County, Texas area, except to come to New Mexico for Court appearances or appearances required by his local counsel in New Mexico. The United States Pretrial Services Office may expand the travel restriction anywhere within the United States, but not into the Republic of Mexico.

He is to avoid all contacts with material witnesses identified in the complaint, and any material witnesses identified in writing by the US Attorney to his attorney in writing.

If there is a complaint as opposed to indictment that did indicate a material witness, why, he is to report on a regular basis to the Pretrial Services Agency. He is to have a dusk to dawn curfew. However, the Pretrial Services officer may expand the curfew requirements without having to come back to Court. Until they do, however, it is a dusk to dawn curfew on a daily basis.

He is to refrain from possessing a firearm, destructive device or other dangerous weapon. He is to refrain from excessive use of alcohol or any use or possession of narcotic drug unless prescribed by a licensed medical practitioner. He is to surrender any passport that he has to the Pretrial Services officer and must obtain no passport.

[18] Finally he is to contact his attorney, either Mr. Simms or one of his Texas attorneys as designated or someone within their office that they may designate, to receive the communication once a week. Your attorney, as an officer of this Court, must notify me if he does not comply with this condition and he will be promptly arrested. However, I impose this restriction for your benefit in that matters will proceed promptly in this Court and your attorney or his office must know how to get ahold of you.

And if you are working like I want you to be, I don't want them having to arrest you at work. I would like to see (inaudible). Should you fail to appear on the charges now pending against you, you face a further felony charge, maximum punishment of which is up to fifteen years in jail and fine of up to two hundred and fifty thousand dollars or both.

You understand the punishment if you fail to appear?

MR. MURRILLO: Yes.

THE COURT: Do you understand the conditions that I have set?

MR. MURRILLO: Yes.

THE COURT: The United States Marshal is ordered to keep the defendant in custody until notifying the clerk that (inaudible) has posed bond and has complied with all [19] conditions of release.

All right. The issues that you have raised as far as propriety of the detention hearing, it is something that you can raise before District Judge Conway, if there is appeal, otherwise, the government (inaudible) does not make the conditions of release.

All right. You can leave if you want to and go ahead and arraign the defendant.

(THEREUPON, Ms. Burnett left the proceedings.)

THE COURT: Will you please stand up?

Will you please state your name aloud?

MR. MURRILLO: Guadalupe Montalvo-Murrillo.

THE COURT: Your social security number?

MR. MURRILLO: I don't have a number.

THE COURT: Before the party is released he must—

MR. MURRILLO: I don't remember the number.

THE COURT: Before the defendant is released he must furnish his social security number to the district clerk, and he may do that through his attorney.

Your date of birth?

MR. MURRILLO: (Inaudible) '67.

THE COURT: Telephone number?

MR. MURRILLO: (Inaudible) 85-8199.

THE COURT: I suggest, since we are using the translator to translate to you, that you respond in Spanish, please.

[20] Your area code is what? Area code of the telephone?

MR. MURRILLO: 915.

THE COURT: And your residence address?

MR. MURRILLO: 2000 (inaudible) El Paso, Texas.

THE COURT: That's—zip code?

MR. MURRILLO: 79936.

THE COURT: Extent of your education?

MR. MURRILLO: Four years.

THE COURT: Are you currently or have you recently been under the care of a physician or psychiatrist?

MR. MURRILLO: No, sir.

THE COURT: Have you been hospitalized for previous narcotice addition?

MR. MURRILLO: Never.

THE COURT: Mr. (inaudible), do you have a copy of the indictment charging your defendant here?

UNIDENTIFIED SPEAKER: Yes, I do.

THE COURT: Do you wish we read it in open Court?

UNIDENTIFIED SPEAKER: No. We would waive the indictment.

THE COURT: And how does he plead?

UNIDENTIFIED SPEAKER: Not guilty, Your Honor.

THE COURT: Thank you.

Not guilty plea, counsel to file (inaudible) [21] report and any motions within ten days. I am entering a discovery order today that District Judge Conway has directed for all his cases. You may get with the district clerk as to receive a copy of that discovery order.

Case is assigned the Honorable John Conway, who will notify you through your attorney of the trial date.

Thank you.

(THEREUPON, the proceedings were concluded.)

Transcript of Appeal from Detention Order
(D. N.M. Feb. 23, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Criminal Case No. 89-86JC

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

GUADALUPE MONTALVO-MURRILLO, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

APPEAL FROM DETENTION ORDER

BE IT REMEMBERED that on the 23rd day of February, 1989, at 10:36 a.m., the above-entitled matter came on before the HONORABLE JAMES A. PARKER, United States District Judge sitting at Las Cruces, New Mexico.

APPEARANCES

FOR THE PLAINTIFF:

THE HONORABLE WILLIAM L. LUTZ
U.S. Department of Justice
United States Attorney
District of New Mexico
Post Office Box 607
Albuquerque, New Mexico 87103
BY: ROBERT GORENCE, AUSA

FOR THE DEFENDANT:
MARY STILLINGER, ESQ.
Cabellero, Panetta & Ortega
Attorneys at Law
521 Texas Avenue
El Paso, Texas 79901

ALSO PRESENT:
JUAN JOSE PENA
Official Court Interpreter
U.S. District Court
Post Office Box 689
Albuquerque, New Mexico 87103

[89] • • • • •

ALFREDO ORTEGA

a witness called on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GORENCE:

Q Sir, could you state your name?
A Alfredo Ortega.
Q Mr. Ortega, what is your occupation?
A I'm a Special Agent with the Drug Enforcement Administration.
Q In that capacity, are you familiar with the events that led up to Mr. Montalvo's arrest and his detour to Chicago, Illinois and his return back here to New Mexico?
A Yes, I am. I'm the resident agent in charge of the DEA office here, so I was technically the supervisor in that entire operation.
Q When did Mr. Montalvo return to New Mexico?

A I received a call around 5:00 o'clock our time by our agents, advising that they were coming back and they should be arriving in Las Cruces around 11:00 or 11:30.
Q This is 5:00 o'clock on Friday, February 10th?
A That's correct.
Q When did Mr. Montalvo arrive back here in Las Cruces?
[90] A The next call I got was from, I believe it was, Richard Sanders, an agent in my office, the next morning, and said they'd come in and they had lodged Mr. Montalvo in the jail.
Q This was Saturday morning though, right?
A This would have been Saturday morning, yeah.
Q What happened on Monday morning, the 13th?
A Monday morning, as is our usual procedure, we contacted Pre-Trial and the Magistrate's Office that we have an arrest to be initialed then or a detention hearing or whatever the case may be.
Q Was that done in this case with Mr. Montalvo?
A To the best of my understanding, yes, it was.
Q Did you actually make a call to the Magistrate?
A I did not personally make the phone call but I went back. But I can remember right now that I seen him, I remember, sometime in the afternoon; either I was called or one of the agents told me that everything had been set up for the 16th.
Q And you got that information on the 13th?
A Yes, sir.
Q Do you remember who told you that?
A I can't, right now. I want to say one of the agents told me, but for some reason, I keep thinking that I got a phone call and it might have been from the Magistrate's [91] Office or from your office up in Albuquerque, but I was – beings as I'm a supervisor, I want to make sure that everything was done as it was suppoed [*sic*] to be and I

remember explicitly that afternoon, a date of the 16th was given.

Q Well, what is the standard procedure then that you said it's ordinarily complied with in regard to when you have custody of a prisoner and what do you do with the Pre-Trial Services and the Magistrate in the ordinary custom and practice?

A Okay. And I think this procedure holds for everybody, but from the arresting officer, then the next morning, I call up to the Magistrate's and I advise them that we've made an arrest and the charges against him, the date of the arrest, the name of the individual, their social security number and his addresss.

Then I call up the Pre-Trial Services and give them the same information. They usually return my phone calls saying that Judge Darden will be available to have a hearing on such and such a date and then I make sure that the Defendant's brought to the courthouse at that time.

Q Do you have firsthand knowledge that that was done in this case, or did you witness any other agent—

A I would have to say, yes, because I was pretty much on [92] top of the situation and everything was running on course,

Q Okay. So in other words, in all likelihood—

A I think if we hadn't called or if something hadn't been set up, I would have remembered, and I would've said either we make the phone call or I'd make the phone call myself right now, you know. All my agents know that that's the procedure and, since I've been here, that's never happened that we haven't called, you know.

Q Do you know whether or not whoever did call over to the Magistrate's Office informed them of procedural irregularities that had occurred,—And I use the word "irregularities" loosely—but I mean the whole idea of the controlled delivery back to Chicago and an initial appearance back in Chicago, do you know if that was relayed to the Magistrate?

A Not to my knowledge, because they only really ask for his name, his pertinent information. They don't ask for any other details.

Q You said this is the customary practice, as far as informing them that somebody is now in custody on a complaint or an indictment has been returned. Do you make it a part of your practice, Agent Ortega, to take it upon yourself or make it incumbent upon yourself to set up hearings for the Magistrate, to tell them when they ought to set things in a timely fashion?

[93] A No, sir.

Q Why is that?

A Well, I'm not the Magistrate. I'm not the Judge. They hear our cases when their calendar permits them.

Q And the Magistrate down here in Las Cruces is a part-time Magistrate; is that correct?

A Yes, sir.

Q And, ordinarily, when does he schedule things to come up for hearing, you know, in conformity with his schedule?

A When he has the next available time.

Q Thursday afternoon or Thursday mid-morning, is there a significance to that date? Because I've always been under the assumption that that's their common time when Judge Darden has court.

A Thursday is probably one of the times that he has hearings the most, and on any given—on the day of any week, Thursday is probably the day that he has them the most.

Q Has there ever been a situation in the past where you've tried to expedite a hearing?

A There's been a couple of times.

A And what's been the result of that?

A If the Judge is not available because he's not – out of town or he's got other previous commitments or something, the U.S. Attorney will instruct me as to what to do [94] next. There's been a couple of times that I've gone before a state judge. There's other times that an individual has been held in jail until the next available time. Or, basically, it's just what the U.S. Attorney's Office advises us to do.

Q But you did testify that you don't take it upon yourself to tell the Magistrate when he has to set things down for hearing.

A No, sir.

MR. GORENCE: I pass the witness, Your Honor.

CROSS-EXAMINATION

BY MS. STILLINGER:

Q Okay. You said somebody – you think somebody else in your office called the Magistrate's Office; correct? Or –

A I don't remember, myself, personally picking up the phone call (sic) and calling up. I wasn't the arresting Officer. But I remember discussing it with people in my office and I remember that afternoon, somebody coming back and, that I don't remember, whether it was one of the agents told me or whether I got a phone call and said the detention hearing would be the 16th.

Q So you don't know if, for instance, the person actually talked to the Magistrate or talked to the Clerk of the Magistrate?

A We never talk to the Magistrates. We always talk to the [95] Clerk.

Q And you don't know – You said probably that the – they would just give the Clerk the information, the name, address, social security number; is that –

A Yes, sir. I mean, yes, ma'am. I'm sorry.

Q And so, under those circumstances, it would be very likely that the Clerk, the Magistrate's Clerk might think that this is somebody that was just arrested; right?

A No. Because one of the things they ask you is the date of arrest.

Q So they would've given the date of February 8th or February 10th.

A Well, it would've been February 8th and they also – one of the things that they always ask us is the location of the arrest.

Q Do you think that would have been Chicago, or, or –

A Oh, I guess it might have –

Q – if they would've given –

A – been – If I'd have made the phone call, I would have said February the 8th at the Orogrande checkpoint; that would've been my response.

Q Okay. But you don't really know what the, what this person told the Magistrate's Clerk?

A No, ma'am.

Q And do you know if – Would somebody normally tell the [96] Magistrate's Clerk if there had been a pending motion to detain?

A Basically, the procedure that we use is, we get the authorization from the Assistant United States Attorney and we mention it to the Clerk that the Government is going to file a motion to detain.

Q Well, you might mention that the Clerk is going to, but –

A The other time is, if the U.S. Attorney happens to be here, then we really don't get involved in that stuff.

Q Um-hum. Do you know if – Well, you – So you don't know if this person, whoever it was that called the Clerk, mentioned that there was a pending motion to detain?

A Oh, the discussions that I had on Monday morning is, we had – Our feelings were that we wanted a detention, but like I said, whether it was actually mentioned or not, it –

Q Might even – It might even have told the Clerk that they were planning on moving to detain the Defendant?

A It's possible, yes, ma'am.

Q Okay. Do you know if Magistrate Darden had court on Monday, Tuesday or Wednesday of that week? That would be the 11th, 12th, 13th, Monday, Tuesday and Wednesday of the week that the Defendant had been initialed?

A Right now, I don't remember when he had court or not.

[97] Q Okay. So you don't know if it was the first available date that he could hear this?

A That's correct.

Q When you found out that it was set for the 16th, did you consult with the U.S. Attorney and give him that information or ask advice about what to do since it wasn't going to be happening for four days?

A Well, usually, when there's a detention hearing, a U.S. Attorney will come down and handle that and, if I remember correctly now, that, I remember getting the name of the U.S. Attorney that was coming down, but I don't remember when.

Q I just want – You said that sometimes previously, you tried to expedite hearings and you might try to contact the U.S. Attorney; but that wasn't done in this case, was it?

A Yes, it was.

Q Oh, it was?

A Um-hum.

Q Okay. So you contacted the U.S. Attorney. Did you try to expedite it, say, something along the lines that the

hearing isn't scheduled until Thursday, what shall be do? Or –

A No. If I remember correctly, when we got the date of the 16th, it didn't strike me strange because of the fact [98] that he had – And, again, like I said, this is a legal thing, – that he had been initialed up in Chicago, so did we have a time frame? Not that I – You know, that wasn't my concern anymore.

Q Um-hum. Um-hum. So, basically, I guess what I was getting at, you followed the standard procedure in calling the Magistrate on Monday and informing their office that you had somebody, giving them this standard information. But, aside from that, did you do anything extra to expedite that hearing?

A The only thing that I remember was, I talked to one of the agents and they had filed some paperwork in Chicago and I said make sure that the U.S. Attorney gets that as soon as possible.

MS. STILLINGER: Okay. Thank you.

THE COURT: Any redirect?

MR. GORENCE: No, Your Honor.

THE COURT: Thank you, Mr. Ortega. Anymore witnesses on behalf of the Government?

• • • • •

ORDER GRANTING CERTIORARI

Supreme Court of the United States

No. 89-163

UNITED STATES, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

ORDER ALLOWING CERTIORARI. Filed October 2, 1989.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

October 2, 1989

U.S. GOVERNMENT PRINTING OFFICE 1989 – 262 203 30007

(5)

No. 89-163

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

33 SP

QUESTION PRESENTED

Whether a failure to observe the "first appearance" requirement of the Bail Reform Act, 18 U.S.C. 3142(f) (Supp. V 1987), requires the release of a person who would otherwise be subject to pretrial detention.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-163

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 876 F.2d 826. The opinion of the district court (Pet. App. 16a-31a) is reported at 713 F. Supp. 1407.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a) was entered on May 31, 1989. The petition for a writ of certiorari was filed on July 28, 1989, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 3142(f) of the Bail Reform Act of 1984, 18 U.S.C. 3142(f) (Supp. V 1987), provides in pertinent part:

> *Detention Hearing.*—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—
>
> * * * * *
>
> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. * * *

STATEMENT

The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, provides that persons charged with certain serious offenses shall be detained prior to trial if "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(e) (Supp. V 1987). The Act further provides that the government or the judicial officer may initiate detention proceedings and that a detention hearing "shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance." 18 U.S.C. 3142(f) (Supp. V 1987). In this case, the district court found that no release conditions would assure respondent's appearance at trial or ensure that he would not pose a danger to the community. Nonetheless, the district court and the court of appeals both concluded that respondent was entitled to pretrial release because there had been a failure to observe the "first appearance" provision of the Bail Reform Act.

1. On Wednesday, February 8, 1989, at approximately 3:30 a.m., United States Customs Service agents stopped respondent at a highway checkpoint north of Orogrande, New Mexico, near the Mexican border. The agents questioned respondent, who was the lone passenger of a pickup truck, concerning his citizenship. Respondent produced papers showing that he was a Mexican citizen legally residing in the United States. The agents then examined respondent's truck. They noted that it had been mounted with an auxiliary gas tank but that the tank was not connected to the engine. Upon further examination, they found that the tank had been fitted with a concealed door. Opening that door, the agents discovered approximately 72 pounds of cocaine, which had a wholesale value of almost $1 million. The agents also found $6,500 in U.S. currency concealed in the passenger section of the truck. Pet. App. 4a, 17a, 21a, 23a; Tr. 73-77 (Feb. 23, 1989).

The agents transported respondent to the Customs Service's local office, where they read respondent his rights and explained them to him. Respondent stated that he had intended to deliver the cocaine to purchasers in Chicago, Illinois. He agreed to cooperate with the Drug Enforcement Agency (DEA) by making a "controlled delivery" under government surveillance. Later that day, several DEA agents escorted respondent by air carrier to Chicago, while another agent drove respondent's pickup truck to that destination. The agents parked the truck at a location in Chicago designated by respondent, but the anticipated purchasers failed to appear to co...plete the transaction. Meanwhile,

on Friday, February 10, 1989, the government filed a criminal complaint in the United States District Court for the District of New Mexico charging respondent with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (1982 & Supp. V 1987). Pet. App. 4a-5a, 17a-18a; Tr. 81-82 (Feb. 23, 1989).

2. Arrangements were then made to transfer respondent back to New Mexico. A magistrate in the District of New Mexico issued a warrant for respondent's arrest, and respondent was taken before a magistrate in the Northern District of Illinois for a transfer hearing pursuant to Fed. R. Crim. P. 40. The magistrate in Illinois advised respondent, who was represented by a public defender, that he faced criminal charges in New Mexico. A local Assistant United States Attorney then explained that "the government was going to move for detention." J.A. 16. After consulting with respondent's counsel, however, the Assistant United States Attorney said that the parties had agreed that if respondent were returned immediately to New Mexico, "we would not hold the detention hearing here and they would waive their right at this point and, however, not waive any rights to preliminary hearings or detention hearings in that district." *Ibid.* The magistrate asked whether respondent consented to the agreement, and he replied through an interpreter, "Yes. They want me to, I am with them." *Id.* at 18. The magistrate indicated that he would "enter an order of removal specifically reserving the issues of * * * detention and probable cause for determination by the District Court in New Mexico." *Id.* at 19. Respondent was returned to New Mexico on the same evening, Friday, February 10, and was placed in the custody of local officials. Pet. App. 5a-6a, 18a-19a.

3. On Monday morning, February 13, 1989, the DEA asked the United States magistrate's office in New Mexico to arrange for respondent's detention hearing. The

magistrate's office scheduled the hearing for Thursday, February 16. At the February 16th hearing, the magistrate described the charges against respondent, who was represented by retained counsel, and read him his rights. The magistrate then verified that the Pretrial Services Office had not yet prepared a report on respondent. The magistrate stated:

> All right. I think, therefore, in the interest of judgment [*sic*, justice], that I should continue the detention hearing for a maximum of three working days, as the United States wishes to request. The detention and motion for detention will need to be filed. Otherwise, I will review the conditions of release and consider those within three working days.

J.A. 23.[1] After observing that Monday, February 20, was a federal holiday, the magistrate rescheduled the hearing for Tuesday, February 21. *Ibid.* The government filed a formal motion for detention on February 17, and the magistrate held the detention hearing, as scheduled, on February 21. At the conclusion of the hearing, the

---

[1] Although the magistrate's statement suggests that the United States desired a continuance, the district court concluded that neither the government nor respondent formally moved for a continuance and that they apparently were prepared to proceed with the detention hearing on February 16. See Pet. App. 19a. Respondent's counsel (who, like the government attorney, had not been present at the Illinois proceeding) did not specifically object to the continuance, but she did contend that the government had failed to move for detention in proceeding before the Illinois magistrate, stating that "it's my understanding that the government is required to move for detention in Chicago where [the defendant] had his initial appearance. I think that he waived his identity hearing, but I don't believe he waived the detention hearing at that point." J.A. 23. The New Mexico magistrate responded that "that's a matter we will have to take up – you can take up with the district judge if you want to." *Ibid.*

magistrate decided to release respondent upon the posting of a $50,000 bond and compliance with other conditions and restrictions. Pet. App. 6a-8a, 19a-20a; J.A. 24-38.

4. The government immediately requested that the district court review the magistrate's decision (see 18 U.S.C. 3145(a)(1) (Supp. V 1987)), and the district court held a *de novo* detention hearing on February 23, 1989. The government submitted that respondent posed both a risk of flight and a danger to the community. Tr. 28, 121-128 (Feb. 23, 1989). Respondent contested that submission, *id.* at 108-120, 128-130, and argued that he was entitled to release because the detention hearing had not been held within the time limits set forth in the Bail Reform Act. *Id.* at 11-12, 17, 29-31.

On March 1, the district court ruled on the detention motion. The court found that respondent "has failed to rebut the resulting statutory presumption that no condition or combination of conditions will reasonably assure [his] appearance as required and the safety of the community." Pet. App. 16a; see *id.* at 21a-24a. The court further concluded, however, that "there has been a failure to comply" with the Bail Reform Act's procedural provisions, "which precludes further detention of [respondent] and mandates the setting of conditions for his release." *Id.* at 16a-17a.

The district court relied on Section 3142(f) of the Bail Reform Act, which states that a detention hearing "shall be held immediately upon a person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance" and further provides that "[e]xcept for good cause, a continuance on motion of such person may not exceed five days, and a continuance on motion of the attorney for the government may not exceed three days." See Pet. App. 24a-26a.

The district court concluded that the Illinois magistrate's February 10th removal order and the New Mexico

magistrate's February 16th *sua sponte* continuance, which was granted "in the interest of justice," Pet. App. 19a, resulted in a violation of Section 3142(f)'s time limits. *Id.* at 24a-30a. The court stated that a person may waive those time limits but concluded that respondent did not "knowingly and voluntarily" waive his right to a prompt hearing. *Id.* at 27a-28a, 30a.

Turning to the issue of the appropriate remedy, the court acknowledged that "Congress did not explicitly state that a failure to comply with § 3142(f) mandates" pretrial release. Pet. App. 31a. The court nevertheless concluded that "meaning can be given to § 3142(f) and Congress' intent can be fulfilled only by pretrial release under conditions." *Ibid.* The court amended the magistrate's release conditions to require bond in the amount of $88,500 and issued an order allowing respondent's release. *Id.* at 16a-17a, 31a.

5. The government appealed and requested a stay of the district court's order. The court of appeals issued a temporary stay but ultimately affirmed the district court's ruling. Pet. App. 1a-15a. The court of appeals concluded that "although the delay between the [respondent's] appearance in Illinois on February 10 and his first appearance in New Mexico on February 16 might be viewed as a minor violation of the maximum permissible period for a defense requested continuance, the further continuance of the hearing by the magistrate, *sua sponte*, constituted a material violation of the specific instructions Congress provided in crafting § 3142(f)." Pet. App. 13a. The court further stated:

> If the mandatory restrictions on the length of time a hearing can be continued, delayed, or postponed are to have any import, we believe the consequences for violations, at least where material and not the fault of the defendant, must likewise be substantive. Under the circumstances of this case, the subsequent holding of

> a *de novo* hearing by the district court did not cure the fact that the New Mexico magistrate was without authority to extend the date of the hearing from February 16 to February 21 absent a finding of good cause. Thus, the district court was correct in selecting the only meaningful remedy available—release on conditions.

Id. at 14a-15a.

Since his release, respondent has failed to appear, as required, for subsequent court appearances. Respondent's counsel has confirmed that respondent is a fugitive. See Br. in Opp. 4. He is believed to have fled to Mexico.[2]

SUMMARY OF ARGUMENT

The Bail Reform Act of 1984 specifies the standards that judicial officers are to apply and the procedures that they are to follow in making pretrial release and detention decisions. See 18 U.S.C. 3142 (Supp. V 1987). The Act provides that upon motion for detention, a judicial officer shall hold a detention hearing "immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance." 18 U.S.C. 3142(f) (Supp. V 1987). But the Act does not specify the consequences of a judicial officer's failure to comply with that requirement.

The court of appeals erred in holding that a failure to comply with the first appearance provision entitles a person who would otherwise qualify for pretrial detention to automatic release on conditions. That sweeping remedy finds no warrant in the Bail Reform Act and is inconsistent with this Court's admonition that judicial remedies

[2] On June 9, 1989, the district court issued a warrant for respondent's arrest, and on August 1, 1989, the court entered an order forfeiting respondent's bond. Further proceedings in the district court are being held in abeyance until respondent is reapprehended. See J.A. 8-10.

should be tailored to the injury suffered and should not impinge unnecessarily on competing interests. As this case demonstrates, the court's remedy produces irrational results at great cost to society and the criminal justice system.

Under the court of appeals' ruling, virtually any infraction of the ambiguously phrased first appearance provision requires pretrial release of the defendant—even if, as in this case, the judicial officer determines that no release conditions can reasonably assure the defendant's subsequent appearance or the safety of the community. The court's remedy has predictable consequences. Upon release, the defendant is very likely to fulfill the judicial officer's expectations and flee the jurisdiction, resume his criminal activity or harm a member of the community. At the same time, this costly remedy does not cure any harm caused by the failure to hold a timely detention hearing. Indeed, a defendant who would have been detained following a prompt hearing has lost nothing by the delay.

The court of appeals' overly broad and ill-conceived remedy is unnecessary. Where a detention hearing has not been provided within the prescribed time limits, the competing interests are properly accommodated by ensuring that the defendant receives a detention hearing at the earliest practicable opportunity. This accommodation preserves the Bail Reform Act's fundamental objective of protecting the integrity of the judicial process and the safety of the public through the detention of persons who pose unavoidable risks of flight or danger to the community. It also protects the defendant's interests by assuring that once the court is informed of the delay it will provide the defendant what he is due—a prompt but deliberate determination of his entitlement to release.

This case demonstrates concretely the severe consequences of the court of appeals' remedy. The government was prepared to conduct a detention hearing at respondent's

initial appearance before a United States magistrate in Illinois. However, respondent, who was represented by counsel, agreed to postpone the detention hearing until his appearance before a United States magistrate in New Mexico. The government also was prepared to conduct a detention hearing at that time. However, the New Mexico magistrate continued the proceedings, and respondent, who again was represented by counsel, did not object to the continuance. Indeed, respondent did not object to the timing of the hearing until the day that the hearing took place. Thus, when the district court reviewed the magistrate's decision, the detention hearing had been held, and at that point no curative steps were necessary. Moreover, since the district court determined that, but for the delay, respondent should be detained, it turned out that the delay did not prejudice respondent at all.

The court of appeals' remedy has resulted in release of the respondent under conditions that the district court determined would not reasonably assure his appearance at trial or the safety of the community. To no one's surprise, respondent has fled the jurisdiction to avoid prosecution. The court's remedy has severely impeded the government's prosecution of a large-scale drug trafficker even though the procedural error did not prejudice respondent in any meaningful way.

ARGUMENT

A FAILURE TO COMPLY WITH THE FIRST APPEARANCE PROVISION OF THE BAIL REFORM ACT DOES NOT REQUIRE THE RELEASE OF A PERSON WHO WOULD OTHERWISE BE SUBJECT TO PRETRIAL DETENTION

A. The Bail Reform Act Does Not Require That A Person Who Has Been Detained Based On An Untimely But Otherwise Adequate Detention Hearing Must Be Released

1. The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, "represents the National Legislature's considered response

to numerous perceived deficiencies in the federal bail process." *United States* v. *Salerno*, 481 U.S. 739, 742 (1987). The Act substantially revised existing bail practices to address, among other matters, "the need to permit the pretrial detention of defendants as to whom no conditions of release will assure their appearance at trial or assure the safety of the community or of other persons." S. Rep. No. 225, 98th Cong., 1st Sess. 3 (1983).

The Bail Reform Act specifies the standards that judicial officers are to apply and the procedures that they are to follow in making pretrial release and detention decisions. See 18 U.S.C. 3142 (Supp. V 1987). Section 3142(f) of the Act states that upon motion of the government (or in certain circumstances, on a judicial officer's own motion) the judicial officer "shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(f) (Supp. V 1987). Section 3142(f) additionally states:

> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days.

Ibid.

This so-called "first appearance" provision has become a persistent source of pretrial disputes. The Bail Reform Act does not define the provision's central terms, such as "first appearance" and "good cause," which must be applied to the highly variable circumstances preceding trial; in addition, the provision is silent with respect to questions such

as whether the defendant can waive the right to a prompt detention hearing and how the time periods set forth in the statute should be calculated.[3]

The most significant dispute with respect to the "first appearance" provision involves the issue of remedy. The Bail Reform Act does not set forth what, if any, remedy is appropriate for a failure to observe the "first appearance" requirement. Nor does the legislative history of the statute shed any light on that question. The Senate Committee Report accompanying the Bail Reform Act, which is the principal source of historical guidance, is silent on the issue of remedy. See S. Rep. No. 225, *supra*, at 21-22.[4] As a result,

[3] As we explain in greater detail in our petition (at 9-10), the courts of appeals have disagreed on various issues, including whether a defendant may waive his right to an immediate detention hearing (compare *United States* v. *Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc), and *United States* v. *Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1985), with *United States* v. *Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985), and *United States* v. *Madruga*, 810 F.2d 1010, 1014 (11th Cir. 1987)); what constitutes a "first appearance" (compare *United States* v. *Maull*, 773 F.2d 1479, 1483 (8th Cir. 1985) (en banc), with *United States* v. *Al-Azzawy*, 768 F.2d at 1144, and *United States* v. *Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986)); when a judicial officer may enter a continuance *sua sponte* (compare *United States* v. *Alatishe*, 768 F.2d 364, 369 (D.C. Cir. 1985), with *United States* v. *Hurtado*, 779 F.2d 1467, 1475 (11th Cir. 1985)); and how weekends and holidays should be treated in calculating the time periods for a continuance (compare *United States* v. *Melendez-Carrion*, 790 F.2d at 991, with *United States* v. *Hurtado*, 779 F.2d at 1474 n.8).

[4] The Senate Report notes that the time limitations in the "first appearance" provision are the same as those in the pretrial detention provision of the District of Columbia Code. S. Rep. No. 225, *supra*, at 22. The District of Columbia Court of Appeals has held, however, that the government may move for detention under the local statute at any point in the judicial proceeding. See *Blunt* v. *United States*, 322 A.2d 579, 583 (D.C. 1974) ("There is no requirement under the statute that the government must make a motion for pretrial detention as soon as

the courts of appeals have divided sharply over the consequences that should flow when the detention hearing is not held "immediately" upon the defendant's "first appearance" before a judicial officer (as the particular court interprets that requirement). Some courts have held that a violation of the "first appearance" requirement does not prevent the government from seeking pretrial detention at a subsequent hearing. See *United States* v. *Vargas*, 804 F.2d 157, 162 (1st Cir. 1986); *United States* v. *Clark*, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc); *United States* v. *Hurtado*, 779 F.2d 1467, 1481-1482 (11th Cir. 1985). That is, even if the detention hearing is not held immediately upon the defendant's first appearance before a judicial officer, or within the short periods allowed for continuances, those courts have taken the position that the violation does not permanently disable the government from seeking, and the court from granting, pretrial detention if it is otherwise justified under the statute. Other courts, including the court below, have taken the opposite position, holding that once a violation of the "first appearance" requirement occurs, then the court may not grant a detention order no matter how compelling the case for detention may be. See *United States* v. *Al-Azzawy*, 768 F.2d at 1145; Pet. App. 15a.

2. This case presents the problem starkly. The court of appeals and the district court agreed that no conditions of release would reasonably assure respondent's appearance at trial or the safety of the community. They also concluded, however, that the magistrate had failed to comply with the

the grounds therefor become apparent or be thereafter foreclosed from making such a motion."). For that reason, there is seldom a need for the prosecution to seek a continuance of the detention hearing in local District of Columbia cases; the District of Columbia Court of Appeals therefore has not had occasion to address the question of what consequence should flow from the granting of an improper continuance under the local District of Columbia statute.

first appearance provision and that respondent was therefore entitled to pretrial release. Pet. App. 1a-3a, 16a-17a. Although it is by no means clear that the delay in holding the detention hearing violated the first appearance requirement, we have not challenged that aspect of the court of appeals' judgment in this case; instead, the sole question before this Court is whether the court of appeals fashioned the appropriate remedy for a "first appearance" violation.[5]

The court of appeals correctly recognized that the Bail Reform Act does not provide a remedy for noncompliance with the first appearance requirement. See Pet. App. 13a.

[5] As we note in the text, the question whether there was a violation of the first appearance requirement is not directly presented here; nonetheless, the Court may regard the point as pertinent to the question of remedy if, for example, the Court considers the appropriate remedy to depend on whether the statutory provision was unambiguous and the violation therefore clearly established. In our view, there was no violation here at all, and certainly not a clear-cut violation. We believe that the "first appearance" referred to in the statute means the first appearance after the filing of a motion for detention. See *United States* v. *Maull*, 773 F.2d at 1483. Once the government (or the judicial officer) moves for detention, the judicial officer must promptly hold a detention hearing, unless the judicial officer grants a continuance or the defendant waives his right to a hearing. In this case, the government was prepared to move for detention at respondent's February 10, 1989, initial appearance in Illinois, but respondent agreed to postpone the question of bail until his hearing in New Mexico. J.A. 14-19. At the February 16, 1989, hearing in New Mexico, the government expressed its intention to seek detention, but the magistrate granted a 3-day continuance without objection from either party to permit the preparation of a pretrial services report. J.A. 20-23. The magistrate held the detention hearing on February 21, 1989. J.A. 24-38. If, as we believe should be the case, respondent's "first appearance" for purposes of the Bail Reform Act is regarded as the February 16 hearing in New Mexico at which the government stated its intention to seek detention, and if the intervening weekend and holiday are not counted against the three-day continuance period, see *United States* v. *Melendez-Carrion*, 790 F.2d at 991, then the detention hearing here was timely.

It drew the wrong conclusion from that observation, however. The court reasoned that if the first appearance requirement is "to have any import," the consequences must be "substantive." *Id.* at 14a. Sensing an obligation to provide some kind of remedy, the court concluded that "the only meaningful remedy" was "release on conditions." *Id.* at 15a. This analysis was misguided. As we explain below, in the absence of express instructions from Congress a judicial remedy should be limited to curing any prejudice to the party, and non-prejudicial errors should be disregarded. This sensible principle has been endorsed by Congress and embraced in various decisions of this Court. The court of appeals erred in granting broader relief.

B. The Remedy For Failing To Hold A Detention Hearing at the Defendant's "First Appearance" Should Be To Hold A Detention Hearing At the Earliest Opportunity

1. Congress and this Court have consistently recognized that the ultimate goal of criminal procedure is a fair and just adjudication and that remedies for procedural errors must be responsive to that overarching objective. See *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369, 2373-2375 (1988). An unnecessarily broad remedy, as much as an inadequately narrow remedy, tends to undermine the criminal justice process. See, *e.g.*, *United States* v. *Mechanik*, 475 U.S. 66, 72 (1986). Thus, for more than a century, Congress has declared by statute that errors that do not affect substantial rights of the parties shall be disregarded. See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). Section 2111 provides that an appellate court "shall give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties." Similarly, Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Both provisions reflect Congress's judgment that prejudice is an

essential prerequesite to granting relief in a criminal case.[6] Similarly, this Court has stated that, even in the case of constitutional violations, "remedies should be tailored to the injury suffered * * * and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981).[7]

---

[6] Although Rule 52(a) is a court rule and has never formally been enacted by Congress, it is clear that Congress intended that rule to govern harmless error questions and that the rule states congressional policy regarding the principles of harmless error. See *United States* v. *Lane*, 474 U.S. 438, 454-455 (1986) (Brennan, J., concurring in part and dissenting in part). Rule 52(a) was designed to take the place of two statutory provisions, 18 U.S.C. 556 (1946), and 28 U.S.C. 391 (1946). When Congress revised both the Criminal Code and the Judicial Code several years after adoption of the Federal Rules of Criminal Procedure, it relied on Rule 52(a) as the reason for repealing the two predecessor statutes so as to avoid redundancy. See H.R. Rep. No. 304, 80th Cong., 1st Sess. 8 (1947) ("effect was given to the changes [made by the Federal Rules of Criminal Procedure] by revising modified sections and repealing superseded provisions"); H.R. Rep. No. 308, 80th Cong., 1st Sess. A236 (1947) (former Section 391 is "superseded by Rule 61 of said Civil Rules, and Rule 52 of said Criminal Rules"). The following year, Congress enacted 28 U.S.C. 2111 to ensure that the harmless error provisions applicable to the district courts through the Civil and Criminal Rules would be applicable to appellate courts as well. See H.R. Rep. No. 352, 81st Cong., 1st Sess. 18 (1949).

[7] See also, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497 (1987) (erroneous jury instruction); *Rose* v. *Clark*, 478 U.S. 570, 577-579 (1986) (due process violation); *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) (Confrontation Clause violation); *United States* v. *Lane*, 474 U.S. 438 (1986) (misjoinder under Fed. R. Crim. P. 8); *Rushen* v. *Spain*, 464 U.S. 114, 117-120 (1983) (violation of right to be present at trial); *United States* v. *Hasting*, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of identification obtained in violation of right to counsel); *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972) (admission of confession taken in violation of Sixth Amendment); *Chambers* v. *Maroney*, 399 U.S. 42, 52-54 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970) (denial of right to counsel at preliminary hearing); *Harrington* v. *California*, 395 U.S. 250, 254 (1969) (improper admission of statement of nontestifying co-defendant); *Chapman* v. *California*, 386 U.S. 18 (1967) (comments on defendant's silence).

Congress and this Court have identified the competing interests in the Bail Reform Act. On the one hand, the government has a compelling interest in ensuring that persons are released on bail only under conditions that will assure their appearance at trial and the safety of other persons and the community. See *Salerno*, 481 U.S. at 747-749; *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979); *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951). On the other hand, the government must pursue that interest through judicial procedures that produce fair and reasonable pretrial release and detention determinations. See *Salerno*, 481 U.S. at 750-752.[8]

---

[8] As the Senate Committee Report accompanying the Bail Reform Act explained:

> Where there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate. This rationale—that a defendant's interest in remaining free prior to conviction is, in some circumstances, outweighed by the need to protect societal interests—has been used to support court decisions which, despite the absence of any statutory provision for pretrial detention, have recognized the implicit authority of the courts to deny release to defendants who have threaten[ed] jurors or witnesses, or who pose significant risks of flight. In these cases, the societal interest implicated was the need to protect the integrity of the judicial process. The need to protect the community from demonstrably dangerous defendants is a similarly compelling basis for ordering detention prior to trial.
>
> * * * * *
>
> However, the Committee recognizes a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests

The remedy for a failure to comply with the Bail Reform Act's procedures should take into account these competing interests. In this case, the government has an obvious, powerful interest in securing the appearance of drug traffickers at trial and preventing them from resuming their illicit activities.[9] At the same time, any arrested person is plainly entitled to a prompt judicial assessment and determination of his entitlement to pretrial release. The remedy for failure to comply with the Bail Reform Act's time requirements for a detention hearing should be responsive to both concerns.

2. The court of appeals' sweeping remedy of automatic release on conditions fails to strike a proper balance. As this case graphically illustrates, a rule of automatic re-

---

it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind.

S. Rep. No. 225, *supra*, at 7, 8 (footnotes omitted).

[9] The Senate Report explains:

> It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses. Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers.

S. Rep. No. 225, *supra*, at 20 (footnote omitted).

lease thwarts Congress's objective of providing rational and fair bail procedures. Prior to respondent's release, the government urged—and the district court determined—that *no* release conditions would reasonably assure respondent's appearance at trial or the safety of the community. The court of appeals nevertheless ordered conditional release. For his part, respondent immediately took the very step that the government and the court had predicted—he fled the jurisdiction to avoid prosecution. See p. 8, *supra*.

That result is fundamentally incompatible with "society's interest in the administration of criminal justice." *Morrison*, 449 U.S. at 364. Occasional procedural errors in the handling of detention hearings are inevitable, particularly since the Bail Reform Act requires the parties and the court to act with great dispatch in the often chaotic period following a defendant's arrest. If a procedural foul-up—even a minor one such as exceeding by one day the permissible period for holding a detention hearing—requires automatic release, no matter how strong the case for detention, many defendants charged with serious crimes can be expected to flee before trial—as respondent did here—or commit serious crimes while on release.

Indeed, we can say without exaggeration that the normal and expected consequence of the court of appeals' rule is increased fugitivity and criminality. After all, the only persons for whom the rule of automatic release will make a difference in their detention status are those who would otherwise be detained pending trial, *i.e.*, those for whom conditions of release will not "reasonably assure" their appearance at trial or the safety of the community. 18 U.S.C. 3142(e) (Supp. V 1987). A rule requiring release of such persons makes it highly likely that they will flee or harm other members of the community.

The court of appeals' rule of automatic release is especially perverse because it fails to provide any substantial counter-

vailing benefits. At the time a violation of the first appearance requirement is discovered, the defendant will have been detained without a hearing for a period of time. If the defendant would have been detained following a prompt hearing, then he has lost nothing by the delay. Indeed, a delay will often work to the defendant's advantage by providing him with additional time to prepare for the detention hearing. Cf. *Barker* v. *Wingo*, 407 U.S. 514, 521 (1972). In fact, it is commonly the case that where detention hearings have been found untimely, the defendant has requested or agreed to the delay. See *United States* v. *Hurtado*, 779 F.2d 1467, 1469, 1474 n.7 (11th Cir. 1985); *United States* v. *Al-Azzawy*, 768 F.2d 1141, 1144 (9th Cir. 1985). Compare *United States* v. *Clark*, 865 F.2d 1433 (4th Cir. 1985) (en banc) (defendant waived right to an immediate hearing); *United States* v. *Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1985) (accord).[10]

On the other hand, if the defendant would have been released following a prompt detention hearing, and the defendant has sought a prompt hearing, he has lost something because of the delay. But what he has lost—a period of time in detention—obviously cannot be returned to him. For that defendant, a prompt detention hearing after discovery of the violation will presumably lead to his release, so a rule of automatic release serves that defendant little better than a requirement that he be afforded a prompt detention hearing, with release to follow if he is found not to be detainable.

[10] As these cases demonstrate, the court of appeals' rule cannot be justified on the ground that the remedy is necessary to deter governmental misconduct. The violations of the first appearance provision in each of those cases resulted, as in this case, from difficulties that judicial officers encountered in interpreting the requirements of the first appearance provision.

A rule of automatic release thus provides defendants with an unjustified windfall; it does not remedy any prejudice that any defendant has suffered from the delay, and it may gravely prejudice the government and the public.[11] What is more, the court of appeals' rule, which absolves a defendant of any obligation to move to protect his own interests, produces a manifestly unfair situation of permitting a defendant to "sandbag" the government by remaining silent until the time limits have run, and then claiming immunity from detention. Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977). In fact, a rule of automatic release creates the greatest incentive for "sandbagging" in the cases in which the need for detention is the most compelling. Where it is clear that the likelihood is very high that the defendant will flee or commit other crimes while on release, the defendant's only hope for release is to remain silent and hope that the court stumbles into a violation of the first appearance requirement.

3. Where a detention hearing has not been provided within the prescribed time limits, the competing interests at stake are properly accommodated by ensuring that the defendant receives a detention hearing at the earliest practicable opportunity. This accommodation preserves the Bail Reform Act's fundamental objective of protecting the integrity of the judicial process and the safety of the public through the detention of persons who pose unavoidable risks of flight or danger to community.

This solution also serves the defendant's legitimate interest in a prompt detention hearing. Federal courts will, we believe, conscientiously attempt to comply with the "first

[11] Notably, the court of appeals' rule appears to prevent the judicial officer from detaining a person even if the failure to comply with the first appearance requirement occurs while the person is released on bond. See *United States* v. *O'Shaughnessy*, 764 F.2d 1035, appeal dismissed on rehearing as moot, 772 F.2d 112 (5th Cir. 1985).

appearance" requirement, and the prosecutor and the defendant's counsel will remind judicial officers of their obligation to do so. If a court fails to conduct a detention hearing in a timely manner, or the prosecutor fails to notify the court of the need to do so, a defendant normally can be expected to bring that error immediately to the court's attention. Once informed of the delay, the court can then be expected to provide the defendant what he is due—a prompt but deliberate determination of his entitlement to release.

The defendant can, of course, minimize the possibility that a judicial officer or the prosecutor may neglect to follow the prescribed time limits by affirmatively asserting his right to a timely detention hearing. There is nothing unreasonable or unfair in requiring a defendant to shoulder responsibility for protecting his own interests in this respect. And there is no reason to believe that defense counsel will fail to protect their clients' interests in securing a prompt detention hearing. Indeed, a defendant's failure promptly to assert his rights provides strong indication that he has suffered no prejudice from the delay, or even that he preferred having the additional time to prepare for the detention hearing.

The accommodation that we suggest, and particularly the requirement that the hearing be held as soon as practicable, also takes into account the judicial system's limited resources and the fact that in some circumstances, delays will simply be unavoidable. See *United States* v. *Ewell*, 383 U.S. 116, 120 (1966). The Bail Reform Act recognizes that the federal judicial system cannot react instantaneously to every problem, and it therefore authorizes judicial officers to continue detention hearings for "good cause." 18 U.S.C. 3142(f) (Supp. V 1987). By the same token, a judicial officer's obligation to correct a failure to hold a prompt detention

hearing must take into account other competing responsibilities and demands. We submit that requiring a judicial officer to take curative action as soon as practicable gives appropriate recognition to that concern.

4. Although the Bail Reform Act provides for a prompt detention determination, it does not impose that requirement at all costs. As previously explained, a judicial officer may continue a hearing for "good cause." 18 U.S.C. 3142(f) (Supp. V 1987). The Act, which does not require a judicial officer to make his decision within a specified time, also provides that a defendant may be detained pending completion of the hearing and that the judicial officer may reopen the hearing at a later date. 18 U.S.C. 3142(f) (Supp. V 1987).[12] And even the court of appeals in this case apparently recognized that a judicial officer may stay a release order (as was done here, Pet. App. 8a) pending further review. Cf. *Hilton* v. *Braunskill*, 481 U.S. 770 (1987). Thus, the structure of the detention procedure under the Bail Reform Act indicates that the requirement for a prompt determination of the detention issue is not as rigid as the court of appeals' ruling would suggest, and that the defendant's interest in a prompt detention determination may at times be subordinated to other competing concerns.

The court of appeals' rule of automatic release is also difficult to reconcile with other provisions of the Bail Reform Act applying to the conduct of detention hearings. The Act

---

[12] Section 3142(f) also provides:

> The person may be detained pending the completion of the hearing. The hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

18 U.S.C. 3142(f) (Supp. V 1987).

confers a variety of other procedural protections on persons subject to detention motions, including protections that are at least as important as the "first appearance" requirement. Yet those protections are undoubtedly subject to harmless error analysis. For example, Section 3142(f) states that the arrested person shall have the right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed. 18 U.S.C. 3142(f) (Supp. V 1987). It also states that the person shall be entitled to present evidence through testimony or proffer, that the rules of evidence shall not apply in the hearing, and that the facts upon which a judicial officer relies in imposing detention must be supported by clear and convincing evidence. 18 U.S.C. 3142(f) (Supp. V 1987). No one has suggested that a mistaken but non-prejudicial application of any of these procedural provisions would warrant reversal of a detention decision. There is nothing unique about the "first appearance" requirement, and thus no reason to create a special remedy for violations of that provision.

C. Respondent Suffered No Prejudice As A Result Of The Delay In This Case

Respondent was apprehended on February 8, 1989, was charged in a criminal complaint on Friday, February 10, 1989, and was taken before a United States magistrate in Illinois on that date. The government was prepared to conduct a detention hearing at that time; however, the government reached agreement with respondent, who was represented by counsel, to postpone respondent's detention hearing until he was returned to New Mexico. The government returned respondent to New Mexico the same evening (February 10) and promptly contacted the magistrate's office on Monday morning, February 13, to arrange for a detention hearing. The magistrate's office scheduled the

hearing for February 16, 1989. Respondent took no steps between February 10 and February 16 to accelerate the hearing.

At the February 16th hearing, respondent's counsel (who apparently was unaware that respondent had specifically agreed to a detention hearing in New Mexico) objected to the government's failure to move for detention before the magistrate in Illinois. But she did not even suggest, much less argue, that the New Mexico magistrate's decision to continue the hearing for "three working days" to permit the preparation of a pretrial services report violated the first appearance provision, and she did not object to the continuance. Respondent took no steps between February 16 and February 21 to accelerate the hearing. Indeed, respondent did not interpose an objection to the timing of the hearing until February 21, 1989, the date that the hearing took place. See Opposition to Detention of the Defendant Without Bond (Feb. 21, 1989).

Thus, when the district court reviewed the magistrate's decision, the detention hearing had been held, and at that point no curative steps were necessary. Furthermore, the magistrates' supposed errors (but see note 5, *supra*) in permitting respondent to postpone a detention hearing at the February 10th removal proceeding, in scheduling the detention hearing for February 16, and in continuing the February 16th detention hearing did not prejudice respondent. The lower courts did not find, nor is there any basis for assuming, that the delays prejudiced respondent in his ability to defend against the detention motion or to defend against the underlying allegations in the case. To the contrary, respondent presumably agreed to the February 10th postponement because it was in his interest: the postponement, after all, allowed him to retain counsel from his home town and to contest detention in a more convenient forum. Furthermore, there is no indication in the record that respondent was prepared to proceed with a detention hear-

ing prior to February 16th. Indeed, it is likely that respondent's retained counsel, who "was hired by [respondent's] family about three hours [before the February 16th hearing]" (J.A. 21), welcomed the continuance.

The only prejudice respondent could have suffered from the delay in holding the detention hearing arose from the prospect that he might be held in custody for a few days longer than he would have been if the hearing had been held earlier and the district court had decided that respondent should be released. Since the district court determined that, but for the delay, respondent should be *detained*, it turns out that the delay did not prejudice respondent at all. The district court presumably would have reached the same conclusion following an earlier detention hearing and would have ordered respondent detained for the entire period before trial.

Respondent's own conduct suggests that he did not view the delays as prejudicial. Although represented by counsel, respondent did not insist on a prompt detention hearing. Quite to the contrary, he specifically waived his right to an immediate detention hearing before the Illinois magistrate; he did not object to the New Mexico magistrate's decision to continue the hearing for three working days; and he did not move to accelerate the hearing during that period. Respondent's failure to insist on a prompt hearing butresses the conclusion that he suffered no prejudice, and indeed perhaps obtained some advantage, from the delay. See, *e.g.*, *United States* v. *Fortna*, 769 F.2d 243, 248-249 (5th Cir. 1985).

Finally, in examining the issue of prejudice, it is worth noting that the case against respondent on the merits was virtually airtight. He was caught in possession of a huge amount of cocaine and a large amount of cash. He admitted that he was aware of the drugs in his truck and intended to deliver them to Chicago. His guilt was therefore clear.

And because he was found in possession of more than five kilograms of cocaine, he was subject to a mandatory minimum sentence of not less than 10 years' imprisonment. 21 U.S.C. 841(b)(1)(A). Besides bearing on the propriety of detention in the first place, the strength of the case against respondent helps establish that the delay in holding the detention hearing did not work to his prejudice. Not only was respondent not likely to be released pending trial, but he was also singularly unlikely to be acquitted. Respondent was therefore not a person for whom the procedural protections of the pretrial detention statute are the most important: one who stands a good chance of not being convicted and for whom detention, if it is ordered, may result in pretrial incarceration in spite of his ultimate vindication after trial.

* * * * *

As this case shows, the court of appeals' overly broad and ill-conceived remedy imposes great costs on the criminal justice system with no corresponding benefits. A rule of automatic release, regardless of the degree of prejudice and the risks associated with release, converts the pretrial detention process into " 'a game in which a wrong move by the judge means immunity for the prisoner.' " *Jones* v. *Thomas*, 109 S. Ct. 2522, 2528 (1989). This surely does not serve Congress's intent in crafting the Bail Reform Act's pretrial detention provisions. In contrast, the alternative that we urge ensures that the defendant is afforded a prompt detention hearing as soon as practicable after a first appearance infraction is discovered, and thus fully protects the individual's interests without infringing the competing interests of society, the courts, and the criminal justice system.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General

NOVEMBER 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—262 201:00005

(6)

FILED
DEC 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-167

In The
Supreme Court of the United States
October Term, 1989

UNITED STATES OF AMERICA,
Petitioner,

v.

[illegible] MONTALVO-MURILLO,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE [illegible] CIRCUIT

BRIEF

[illegible]

QUESTION PRESENTED

Whether the government can obtain the pretrial detention without bond of a person when a detention hearing has not been held in compliance with the mandatory provisions of the Bail Reform Act, 18 U.S.C. § 3142(f).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

No. 89-163

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

GUADALUPE MONTALVO-MURILLO,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In the early morning hours of Wednesday, February 8, 1989, Guadalupe Montalvo-Murillo, a resident alien who spoke little or no English, was arrested in Orogrande, New Mexico, when 72 pounds of cocaine were discovered in the truck he was driving. Pet. App. 4a, 17a, Tr. 73-77 (Feb. 23, 1989). He was taken by the arresting agents to Las Cruces, New Mexico, the site of the nearest available magistrate. However, instead of taking him before a federal magistrate, the agents questioned him

and then took him to Chicago, Illinois, so he would assist them in apprehending the others involved when he made delivery at the designated location. Pet. App. 4a-5a, 17a, Tr. 82 (Feb. 23, 1989). Unfortunately for Mr. Montalvo, this plan failed.

He was finally brought before a federal magistrate in the Northern District of Illinois on February 10, 1989, over forty-eight hours after his arrest in the District of New Mexico. At this initial appearance, the magistrate advised Mr. Montalvo of his rights and then went on to question counsel about bond and the status of the case. The magistrate was puzzled as to why bond had not been set earlier in New Mexico, stating "[T]his is different from anything I ever heard of before." J.A. 14-19, Pet. App. 5a-6a, 18a-19a.

Athough the government moved to detain Mr. Montalvo at the initial appearance in Chicago, it was ultimately agreed that Mr. Montalvo would be immediately removed to the District of New Mexico for his detention and preliminary hearings. J.A. 16-19. Mr. Montalvo arrived in Las Cruces later that same day, accompanied by the same agents that had taken him to Chicago. Pet. App. 6a, 19a. However, his detention hearing was not held until February 21, 1989, some thirteen days after his arrest and eleven days after the government moved to detain him. J.A. 4.

In the interim, the government contacted the magistrate's office in Las Cruces. It is unclear whether that office was advised that the government had moved to detain Mr. Montalvo or that it would move to detain him. In any event, the government did not advise the court of

the need for a prompt setting. Consequently, a hearing was set for February 16, 1989. J.A. 45-46. In this interim, Mr. Montalvo was unrepresented by counsel.

At that hearing on February 16, 1989, the government failed to inform the court or counsel that it had moved to detain Mr. Montalvo in Chicago. As a result, the magistrate appeared to be somewhat confused as to the status of the proceedings. The magistrate proceeded with the hearing as though it were an initial appearance, advising Mr. Montalvo of his rights, the charges against him, and the maximum penalty. J.A. 21-22. Consistent with his treatment of that hearing as an initial appearance, the magistrate "continued the detention hearing for a maximum of three working days" J.A. 23.

Mr. Montalvo's counsel, unaware that the government had moved to detain Mr. Montalvo, objected to the detention hearing, based on her understanding that the government had not moved to detain defendant in Chicago. J.A. 23. The attorney for the government did not advise the court that it had already moved to detain the defendant, nor did he correct counsel. Yet, neither did the government move to detain the defendant at that time. Consequently, the Court set the detention hearing for February 21, 1989, over Defendant's objection. J.A. 3.

On February 21, the detention hearing was held over defense counsel's renewed objection. At the conclusion of the hearing, the magistrate set a $50,000 bond and imposed certain other restrictions which he found would reasonably assure the safety of the community and the defendant's appearance. J.A. 34-38, Pet. App. 8a, 20a. The government appealed to the district court and a hearing

was held on February 23, 1989. On appeal, the district court found that the government's failure to comply with the mandatory provisions of the Bail Reform Act precluded the detention of Mr. Montalvo. The court did, however, increase his bond to $88,500. Pet. App. 16a-17a, 31a. The Tenth Circuit affirmed. Pet. App. 1a-15a.

SUMMARY OF THE ARGUMENT

The Bail Reform Act of 1984's unambiguous language allows the government to do something it was unable to do prior to the passage of that legislation – seek to detain a person in a non-capital case without bond pending trial. 18 U.S.C. §§ 3141 *et seq*. However, the Act only allows pretrial detention under certain circumstances. Section 3142(e) provides that a person may be detained without bond after a detention hearing held pursuant to the provisions of 18 U.S.C. § 3142(f). One of the provisions of that section is that the detention hearing be held upon the person's first appearance before the judicial officer, and that, "except for good cause," the defendant may get a continuance of no more than five days, and the government may get a continuance of no more than three days. 18 U.S.C. § 3142(f).

In the present case, the government moved to detain Mr. Montalvo at his initial appearance, but he was not afforded a detention hearing until eleven days later. This delay was not caused by the defendant and was not the fault of the court. The delay was caused in part by the government's violation of the Federal Rules of Criminal

Procedure in transporting Mr. Montalvo from New Mexico to Chicago without first taking him before a magistrate.

The government manufactured a bizarre situation when they took Mr. Montalvo for an initial appearance in Chicago and there moved to detain him, although New Mexico was both the district of arrest and the charging district. This condition worsened, when, once back in New Mexico, the government failed to inform either the court or defense counsel of the nature of the proceedings in Chicago.

The government's suggestion of balancing the interests of the parties in this situation has already been done. Congress balanced the interests of the parties when it drafted the Bail Reform Act, and it has spoken in clear, unambiguous language. To accept the government's suggestion, that if a timely detention hearing is not held then a hearing should be held as soon thereafter as is practicable, would render the clear language of the statute meaningless, a result that Congress clearly did not intend.

Pretrial detention may only be sought under the narrow circumstances set forth in the Act. The Act did not grant new protections to a defendant, it granted additional powers to the government. Those powers are, however, strictly limited so that the statute does not violate a person's due process rights. Because the statute is a grant of power, a failure to follow the terms of the statute precludes the government from using that power to detain a person.

Contrary to the assertion of the government, the ruling of the Court of Appeals will not result in severe

consequences. The situation out of which the instant case arose was factually unique, and created by the government ignoring the Federal Rules of Criminal Procedure and failing to comply with the mandatory provisions of the Bail Reform Act. Accordingly, the lower courts were correct in finding that congressional intent can only be fulfilled if the government is precluded from detaining a person without bond when the provisions of section 3142(f) are not followed.

ARGUMENT

THE GOVERNMENT CANNOT OBTAIN THE PRETRIAL DETENTION OF A PERSON WITHOUT BOND IF A DETENTION HEARING HAS NOT BEEN HELD IN COMPLIANCE WITH THE MANDATORY PROVISIONS OF THE BAIL REFORM ACT, 18 U.S.C. § 3142(f).

A. The Unambiguous Language Of The Bail Reform Act Requires A Timely Detention Hearing As A Condition For Pretrial Detention Without Bond.

In drafting the Bail Reform Act of 1984, Congress carefully delineated the circumstances under which pretrial detention would be permitted. *United States v. Salerno*, 481 U.S. 739, ___, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987). Section 3142(e) of the Bail Reform Act provides, in part:

> If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

Congress indicated its intention that this section meant detention may be ordered *only* after a hearing pursuant to subsection (f). S.Rep. No. 255, 98th Cong., 2nd Sess. 20, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3203 (hereinafter S.Rep. No. 255).

Section 3142(f) then sets forth certain requirements of the detention hearing, which Congress termed "precondition[s] of pretrial detention",[1] one of which is that:

> The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days.

Although the government and many courts have referred to the above-quoted text as the "first appearance provision," it is helpful to separate the two procedural requirements therein. The first sentence contains the actual "first appearance provision," i.e., that the motion to detain must be made upon the person's first appearance before the judicial officer.[2] The second procedural issue is in the second sentence, which contains the time limitations for a continuance of a detention hearing. Legislative history reveals that Congress specifically took the

---

[1] S.Rep. No. 255 at 18.

[2] There is some dispute as to the interpretation of this sentence, see note 11, *infra*.

latter time limitations from the District of Columbia Code, although the "first appearance" requirement is original. S.Rep. No. 255 at 22.

Because Congress specifically cited the District of Columbia Code, it is useful to look at that statute. The District of Columbia Code has no first appearance requirement, and in fact, specifically allows a motion to detain "[w]henever the person is before a judicial officer" or "[w]henever the person has been released . . . and it subsequently appears that such person may be subject to pretrial detention . . . ." D.C. Code § 23-1322(c)(1) and (2). The continuance provision, however, in the District of Columbia Code is similar to the one in the Act:

> The pretrial detention hearing shall be held immediately upon the person being brought before the judicial officer *for such hearing* unless the person or the United States attorney moves for a continuance. A continuance granted on motion of the person shall not exceed five calendar days, unless there are extenuating circumstances. A continuance on motion of the United States attorney shall be granted upon good cause shown and shall not exceed three calendar days. The person may be detained pending the hearing.

D.C. Code § 23-1322(c)(3) (emphasis added).[3]

The language of the District of Columbia Code, like the language of the Act, is mandatory. Section 23-1322(b)

[3] The fact that Congress omitted the emphasized language, as well as the specific allowances for a motion to detain to be filed at any time, supports the "first appearance provision" of the Act. *See United States v. Holloway*, 781 F.2d 124, 128 (8th Cir. 1986).

provides that "[n]o person . . . shall be ordered detained unless the judicial officer holds a pretrial detention hearing in accordance with the provisions of subsection (c) of this section . . . ."

In the present case, the government timely moved to detain Mr. Montalvo at his initial appearance in Chicago. The language used by the attorney for the government in Chicago was somewhat ambiguous, but she herself, in a conference call with the court, represented to the district court in New Mexico that she had moved for detention in Chicago. Tr. 59 (Feb. 23, 1989). Additionally, although the government now retreats from that position, it vigorously argued to the district court that it had moved for detention in Chicago. Tr. 6, 9, 10, 13, 14, 15, 18, 21, 24, 27, 32, 40, 52, 54 (Feb. 23, 1989). In any event, the court of appeals found that the government had adequately moved to detain at the initial appearance in Chicago. Pet. App. 11a.[4]

Consequently, it is not actually the "first appearance" requirement that was violated in the present case, but the

[4] If the Court finds that the government did not move to detain in Chicago, neither should it find that it moved to detain at the first appearance in Las Cruces. The government is confused in its brief when it asserts that it "expressed its intention to seek detention" in Las Cruces. Pet. Brief at n.3. That expression occurred in Chicago, not at the February 16, 1989, hearing in Las Cruces. The government did not express its intention to seek detention in New Mexico until it filed its written motion on February 17, 1989, which would have been untimely but for the prior motion to detain made in Chicago. The district court, without deciding whether the government moved to detain in Chicago, found that the provisions of section 3142(f) had been violated regardless. Pet. App. 29, n.5.

continuance provision. Mr. Montalvo was not given a detention hearing until eleven days after the motion to detain was made. There was no motion for continuance made, and none granted until the magistrate did so, sua sponte, on February 16, 1989, over Mr. Montalvo's objection.[5]

Although the first appearance requirement of the Act has been open to some interpretation,[6] the continuance provisions of section 3142(f), or the similar provision of the District of Columbia Code, could not be clearer.[7] Nevertheless, the government is asking this Court to write the continuance provision out of the Act.

An analysis of the meaning of the statute must start with the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692 (1985). This is also where the analysis should end "for where the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises*, 489 U.S. ___, ___, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989)(quoting

---

[5] On February 16, 1989, counsel for Mr. Montalvo clearly objected to the magistrate setting a detention hearing the following week, J.A. 23, and the magistrate so found at the later hearing. J.A. 32.

[6] Compare, for example, *United States v. Maull*, 773 F.2d 1479 (8th Cir. 1985)(en banc), with *United States v. Holloway*, 781 F.2d 124 (8th Cir. 1986).

[7] There has been some dispute as to the method of calculation time, but that issue is not involved here. Even without counting weekends and holidays, the continuance limit was violated.

Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917).

The terms "shall" and "may not" in section 3142(f) are mandatory, not precatory, language. It is well established that Congress knows the difference between mandatory and precatory language, and can use whichever language is necessary to effectuate its intent. *See, e.g., Mallard v. United States District Court for the Southern District of Iowa*, ___ U.S. ___, ___, 109 S.Ct. 1814, 1818, 104 L.Ed.2d 318 (1989) ("request" is precatory as opposed to "shall" which is mandatory).

Courts of appeals have construed the language of section 3142(f) as mandatory, although some have found that the right to a timely hearing can be waived. *See United States v. Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1987)(agreeing that the court's prior decision in *United States v. Payden*, 759 F.2d 202 (2d Cir. 1985) appropriately met "the statutory imperative of addressing the detention issue at the initial appearance"); *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989)(en banc)(by recognizing the necessity of a knowing and voluntary waiver of time limitations, the court acknowledged the mandatory language of the statute); *United States v. O'Shaughnessy*, 764 F.2d 1035, 1038 *vacated on reh'g as moot*, 772 F.2d 112 (5th Cir. 1985)(court should not "deviate from the Act's unambiguous mandatory language"); *United States v. Holloway*, 781 F.2d 124, 128 (8th Cir. 1986)(court not willing to rewrite the Act by "reading out of the statute completely the requirement that a detention hearing be held upon a defendant's first appearance"); *United States v. Al-Azzawy*, 768 F.2d 1141, 1145 (9th Cir. 1985)("procedures under section 3142 of the Act must be strictly followed as a

precondition to detention under subsection (e)"); *United States v. Rivera*, 837 F.2d 906, 925, *reh'g granted on other grounds*, 847 F.2d 660 (10th Cir. 1988)(failure to hold detention hearing demanded by the statute "inexcusable"); and *United States v. Alatishe*, 768 F.2d 364, 369 (D.C. Cir. 1985) (although court made a unique exception for an unobjected to sua sponte continuance, it found that "the statute explicitly requires that a 3142(f) hearing be conducted 'immediately' following a timely motion for pretrial detention").

In the present case, there is no question that Mr. Montalvo did not waive the time limitations in the Act. The magistrate found after the initial appearance in Chicago that she would enter an order "specifically reserving the issues of intention [sic] detention and probable cause for determination by the District of New Mexico . . . ." J.A. 19. She also stated the understanding that Mr. Montalvo would be "transported promptly." *Ibid.* The attorney for the government represented to the court that Mr. Montalvo would be transported back to New Mexico that same day, *Ibid.*, and in fact he was. Pet. App. 6a, 19a. Under those circumstances, there is no reason to suppose that Mr. Montalvo waived any time period limitations.[8]

Additionally, once back in New Mexico, in the custody of the government, Mr. Montalvo was unrepresented

[8] The district court specifically found that "the defendant did not knowingly and voluntarily waive his right to a detention hearing or waive his rights to the time limits contained in the statute." Pet. App. 27a. That finding of fact should remain undisturbed by this Court.

until February 16, 1989,[9] and consequently unable to petition the court for an earlier hearing. Although Mr. Montalvo was represented by counsel at the February 16, 1989, hearing, the court and defense counsel were not made aware of the proceedings in Chicago by the one common party to both hearings – the government.

Mr. Montalvo was held in custody for thirteen days after his arrest, and eleven days after the government moved to detain him, before he was afforded a hearing. The delay was through no fault of his own, or of the courts. The government asks this Court to fashion a "remedy" that would permit unfettered violation of the provision of section 3142(f). As set forth below, the Court should not create a remedy where Congress has purposefully provided none.

B. The Bail Reform Act Does Not Provide A Remedy For An Untimely Detention Hearing Because Under the Clear Terms Of The Statute, A Hearing May Not Be Held Outside Of The Time Limits Set Forth In The Statute.

The court of appeals found that Congress did not provide a remedy for a failure to observe the requirements of section 3142(f). Pet. App. 13a. That court agreed with the district court that the only meaningful remedy for such a failure was release on conditions. Pet. App. 15a, 31a.

[9] Counsel was appointed by the court the previous day, but did not have an opportunity to speak to Mr. Montalvo until the 16th. Tr. 37 (Feb. 23, 1989).

Although the court reached the correct conclusion, that release on conditions was mandated, it was not correct in its characterization of this result as a "remedy". Where the mandatory language of the statute requires a hearing to be held within a certain period of time, the hearing simply cannot be held otherwise. Consequently, the result of the failure to comply with the provisions of the Act, is the conclusion that the February 21, 1989, hearing before the magistrate was not a detention hearing but rather a bail hearing to set conditions of release under section 3142(c).

Rule 4(a) of the Federal Rules of Appellate Procedure provides a useful analogy. The Rule requires that a notice of appeal "shall be filed" within thirty days of the entry of final judgment in a civil case. There is a provision for an extension of time upon a showing of "excusable neglect." Rule 4(a)(5). There is not, however, any remedy in the Rule for a failure to timely file a notice of appeal.

The courts have not attempted to manufacture any remedy for the failure to timely file a notice of appeal. It has been held that the timely filing of the notice is mandatory and jurisdictional. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982). "Rule 4(a) is not jurisdictional in the subject matter jurisdictional sense, it is nonetheless mandatory and a necessary prerequisite for appellate review." *Andre v. Guste*, 850 F.2d 259, 262 (5th Cir. 1988)(citations omitted); *Haney v. Mizell Memorial Hospital*, 744 F.2d 1467, 1472 n.3 (11th Cir. 1984).

Andre v. Guste, 850 F.2d 259, is a particularly instructive opinion on the construction of Rule 4(a). In that case,

appellant failed to timely file a notice of appeal from the denial of his petition for writ of habeas corpus. He attempted to file a second petition, on the same grounds, because he was prevented from filing his notice of appeal on the first. The Fifth Circuit rejected his attempt to sidestep Rule 4(a):

> If we were to hold that, despite Andre's failure to timely appeal the dismissal of his first petition, Andre could obtain an out-of-time appeal by the simple expedient of refiling his first petition, that would be tantamount to doing away with the clear requirements of Rule 4 for an entire class of litigation.

Andre v. Guste, 850 F.2d at 263.

So too, in the present case, would the Court do away with the clear requirements of section 3142(f) if it allows the government to "remedy" an untimely hearing by holding one at a later date.

Section 3142(f), upon a finding of "good cause", allows for an exception to the time limits therein. Rule 4(a) similarly contains an exception to the time limit upon a showing of "excusable neglect." These are the escape valves in the Act and in the Rule that make a "remedy" unnecessary.

In the normal course of proceedings, if there is some reason a detention hearing cannot or should not be held within the time limits of section 3142(f), the parties will alert the court. The court then has the opportunity to find if there is good cause for a continuance past the time limits set forth in the Act.

In the present case, the government was the only party aware of the procedural irregularities, and it failed to bring them to the court's attention. Under Rule 4(a), a late filing of a notice of appeal will not substitute for the filing of a motion for an extension of time. *Pryor v. Marshall*, 711 F.2d 63, 64-65 (6th Cir. 1983)(the Rule means what is says, and the only exception permitted is the excusable neglect provision of Rule 4(a)(5)). Neither should an untimely hearing substitute for a motion for a continuance for good cause.

This Court has been unwilling to find exceptions to the clear and unambiguous language of Congress. *United States v. Monsanto*, ___ U.S. ___, ___, 109 S.Ct. 2657, 2662, 105 L.Ed.2d 512 (1989) (Congress could not have used stronger words to express its intent than that a court "shall order" forfeiture of all property). The Act unambiguously excludes any continuance outside the time limits, except for good cause. The fact that Congress is silent on a particular situation does not demonstrate ambiguity, but rather breadth. *Id.* at 2663.

The Court need not find a "remedy" for a violation of the time limits in section 3142(f), because the language of the statute is clear that a detention hearing cannot be held outside those time limits. Neither should the Court create an exception to those limits. Congress provided the only necessary exception to the time limits by allowing for a further continuance upon a showing of good cause. To find otherwise would be to read the time limits out of the statute entirely.

C. The "Remedy" Proposed By The Government Is Contrary To The Clear Intent Of Congress And Would Eviscerate The Statute.

The government proposes to the Court that the "remedy" for an untimely hearing should be to hold the hearing at the earliest opportunity after the time limits have run. Given the clear language of the statute, this "remedy" is unavailable.

The Bail Reform Act was drafted with the understanding that the interests of society should be balanced against the rights of an arrested person. The Senate Judiciary Committee recognized that:

> a pretrial detention statute may . . . be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind.

S.Rep. No. 255 at 8. As a result, Congress drafted a statute that is "appropriately narrow in scope, and that provides necessarily stringent safeguards to protect the rights of defendants." *Id.* at 7.

One of the important procedural safeguards in the Act is the strict time requirements in section 3142(f). Congress indicated its concern that a defendant is entitled to a prompt detention hearing:

> The period of a continuance sought by the defendant and of one sought by the government is confined to five and three days, respectively, in light of the fact the defendant will be detained during such a continuance.

S.Rep. No. 255 at 22.

Such time limitations are consistent with due process, because as one court has found, "failure to hold the hearing, or make provision for a short continuance, at the initial appearance means that no attention would have been paid to the detention of the defendant, a situation raising grave constitutional problems." *United States v. Coonan*, 826 F.2d at 1184.

This Court has had the opportunity to rule on the constitutionality of the Act in *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The Court found that one of the procedural protections in the Act was the right to a prompt hearing. *Id.* at 2101. The Court weighed this and the other procedural protections in the Act against society's interest in crime prevention, and found

> Given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, we conclude that the Act is not facially invalid under the Due Process Clause of the Fifth Amendment.

Id. at 2104.

Here, however, we are concerned not with a constitutional violation, but with a statutory violation.[10] Generally, this Court will construe a statute to avoid a decision as to its constitutionality. *United States v. Monsanto*, 109 S.Ct. at 2664. The Court has already decided in *Salerno* that the Act is constitutional based on the procedural

---

[10] The cases cited in Petitioner's brief at n.7, p.16, are inapposite. All of those cases deal with the post-conviction review of a constitutional violation of the defendant's rights.

protections provided therein. The Court need not address whether the Act would be constitutional if the procedural protections were not upheld. In any event, the language of the statute is mandatory, and consequently the Court need not decide whether due process requires that the statute be followed. Neither may it ignore the statute if it views the result of its violation a "windfall" for the defendant.

> Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.

Commissioner of Internal Revenue v. Asphalt Products Co., Inc., 482 U.S. 117, ___, 107 S.Ct. 2275, 2278, 96 L.Ed.2d 97 (1987).

Additionally, Rule 52(a) of the Federal Rules of Criminal Procedure is inapplicable to a violation of the Act. That Rule, as well as the corollary in civil law, 28 U.S.C. § 2111, applies to post-judgment review. This concept of harmless error applies to the determination of whether the error could have contributed to a conviction. *Pope v. Illinois*, 481 U.S. 497, ___, 107 S.Ct. 1918, 1922, 95 L.Ed.2d 439 (1987); *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

> The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.

Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460 (1986). Such is not the case here.

The thrust of the time limitations in the Act is to ensure that a defendant is afforded a prompt detention hearing. His substantial rights have been affected if he is denied a prompt hearing.

Other procedural protections in the Act, such as the right to coursel and the right to present evidence, are designed to ensure a fair dentention hearing. Although Respondent would not argue this point, it is possible that a violation of those rights could be subject to a harmless error analysis, because a defendant may have been afforded a fair hearing notwithstanding the violation. However, it is axiomatic that a defendant has not been afforded a *prompt* hearing once the time limits have been violated.[11]

Under the government's proposed "remedy", there would be no requirement for a timely detention hearing for the innocent or the guilty, for the flight risks or for those who should be released on bond. The government contends that procedural errors like the one involved in the instant case, are inevitable, and that their proposed "remedy" is necessary to prevent "increased fugitivity and criminality." Pet. Brief at 19.

[11] In *United States v. King*, 818 F.2d 115 (1st Cir. 1987) the court applied a harmless error analysis to an untimely detention hearing. Although Respondent would argue that the analysis was incorrect, in that case defendant was being held in state custody, and therefore had no liberty interest to be protected by a prompt hearing.

On the contrary, not only are the facts of the present case unique, but the procedural errors were most certainly not inevitable. The initial violation of Rule 5 of the Federal Rules of Criminal Procedure began the unusual course of events. That violation was not inevitable, but rather purposeful. Tr. 8 (Feb. 23, 1989). After the government moved to detain Mr. Montalvo in Chicago, it transported him to New Mexico, but failed to inform the court there of the status of the proceedings. This action was gross negligence at best.[12]

The government repeatedly refers to the result of the lower court's decision as "automatic release." The court, however, did not order automatic release, and in fact increased the conditions of release which the magistrate had found would reasonably assure the safety of the community and the appearance of the defendant. Indeed, automatic release "may well be disproportionate to the violation . . . and would contradict the intent evinced in § 3142(c) to protect society." *United States v. Al-Azzawy*, 768 F.2d at 1148 (court remains free to impose substantial conditions of release).

The government urges that Congress' intent in drafting the Bail Reform Act would not be served if defendant cannot be detained notwithstanding any violations of the Act. It is true that one of the aims of the Act was to decrease the frequency of crimes committed by persons

[12] The agent of the D.E.A. who was the supervisor in charge of Mr. Montalvo's case, testified that "this is a legal thing, – that he had been initialed up in Chicago, so did we have a time frame? Not that I – You know, that wasn't my concern anymore." J.A. 47.

on pretrial release. However, in a statement particularly applicable to the present case, this Court has found:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . [there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'"

Rodriguez v. United States, 480 U.S. 522, ___, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533 (1987) (citations omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

BERNARD J. PANETTA, II
MARY STILLINGER
Attorneys for Respondent
CABALLERO, PANETTA & ORTEGA
521 Texas Avenue
El Paso, Texas 79901
(915) 544-0042

December 1989

(1)

No. 89-163

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURRILLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

16 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-163

UNITED STATES OF AMERICA, PETITIONER

v.

GUADALUPE MONTALVO-MURILLO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The United States petitioned this Court for review in this case to resolve a conflict among the circuits on an issue of great practical importance: whether any failure to observe the Bail Reform Act's "first appearance" provision requires the pretrial release of a person who would otherwise be subject to pretrial detention. Respondent expends considerable energy explicating the procedural violation that supposedly occurred in this case. We submit that respondent's interpretation of the record is incorrect. In the end, however, that dispute is beside the point. The important issue is the consequence of the supposed violation. Respondent offers no sound justification for his position that any violation of the "first appearance" and continuance provisions, no matter how minor, entitles a defendant to pretrial release on conditions that have been judicially

determined to be insufficient to prevent his flight and continued criminality.

1. Respondent criticizes our characterization of the events leading to the district court's release order in this case, so it may be useful to review the events briefly.

Wednesday, February 8, 1989: Customs agents stopped respondent near Orogrande, New Mexico, and found him in possession of 72 pounds of cocaine. After being given *Miranda* warnings, respondent agreed to cooperate with Customs and DEA agents by making a "controlled delivery" of the drugs to persons he said were awaiting their delivery in Chicago. The agents flew to Chicago with respondent later that day. Pet. App. 4a-5a; Tr. 7-8 (Feb. 23, 1989).[1]

[1] Respondent is critical of the government for not taking him before a magistrate in New Mexico on February 8, 1989, for an initial appearance. See Resp. Br. 1-2, 2[illegible]. As the prosecutor explained to the district court, however, shortly after respondent was apprehended, he agreed to participate in a "controlled delivery" of the cocaine in Chicago. Respondent then voluntarily accompanied the agents to Chicago in an attempt to apprehend the other participants in the smuggling venture. His arrest was therefore postponed until after the controlled delivery. When the controlled delivery failed, the government on February 10, 1989, filed a complaint, obtained an arrest warrant, and promptly took respondent before a federal magistrate in Chicago for an initial appearance and transfer hearing under Rule 40, Fed. R. Crim. P. Even if respondent were deemed to be under arrest during the period of the controlled delivery for purposes of Rule 5, Fed. R. Crim. P., it was not improper to postpone respondent's initial appearance until February 10. To hold an initial appearance before the controlled delivery would have increased the risk that respondent's accomplices would learn of his arrest, which would defeat any prospect of a successful controlled delivery in Chicago. See Tr. 8, 13, 17 (Feb. 23, 1989). Rule 5 provides that an arrestee must be taken before a magistrate for an initial appearance "without unnecessary delay." Because of respondent's agreement to cooperate with the agents and the need to avoid compromising his status as a cooperating witness, the delay in taking him before a magistrate was "necessary" and therefore did not result in a violation of Rule 5.

Friday, February 10, 1989: The controlled delivery in Chicago failed. While respondent and the agents were still in Chicago, the government filed a criminal complaint in New Mexico charging respondent with possession of cocaine and obtained a warrant for his arrest on that complaint. Respondent was then promptly brought before a United States magistrate in Chicago for a transfer hearing. See Fed. R. Crim. P. 40. The prosecutor who was handling the hearing stated at that time that she had intended to move for detention but that instead she had reached an agreement with respondent's appointed lawyer under which respondent would consent to be returned to New Mexico and would waive his right to both a detention hearing and a preliminary hearing in Chicago. Respondent was returned to New Mexico that evening. Pet. App. 5a-6a; J.A. 16-19.[2]

Monday, February 13, 1989: On Monday morning, the government asked the United States magistrate in Las Cruces to schedule a detention hearing for respondent. The magistrate's office scheduled the hearing for the next

[2] Respondent contends (Br. 2, 9, 13 ~~10-11, 16~~) that the government moved for detention on February 10 in Illinois and that the detention hearing should have been conducted there or promptly upon his return to New Mexico. As the district court and the court of appeals found, however, while the government clearly signaled at the February 10 hearing that it would be seeking detention, it did not formally seek detention at that time. The government sought detention the following week when, on February 13, it requested that a detention hearing be set. See Pet. App. 11a, 20a, 29a n.5. Although the court of appeals treated what transpired at the February 10 hearing as the equivalent of a motion for detention, in doing so the court recognized that no specific motion had been made. *Id.* at 11a. Respondent notes (Br. 10) that the New Mexico prosecutor told the district court that he believed a detention motion had been made in Chicago, but that was before the prosecutor, who did not handle the Chicago hearing, had had an opportunity to see the transcript of that hearing. See Tr. 22 (Feb. 23, 1989).

available date, February 16. Pet. App. 6a-7a; Tr. 21 (Feb. 23, 1989).[3]

Thursday, February 16, 1989: The magistrate held a brief hearing. He noted that the government would be filing a written detention motion shortly. Because the pretrial services office had not completed its report on respondent, the magistrate continued the detention hearing for two working days, until February 21, 1989 (Monday, February 20, 1989, was a holiday). Respondent did not object to the continuance, although respondent's counsel expressed the view at that time that the government should have moved for detention in Chicago, at the time of his transfer hearing. Pet. App. 7a; J.A. 21-23.[4]

Friday, February 17, 1989: The government filed its written motion, requesting that respondent be detained. Pet. App. 8a.

Tuesday, February 21, 1989: The magistrate held a detention hearing, at the conclusion of which the magistrate ordered the defendant released on conditions. Pet. App. 8a.

Thursday, February 23, 1989: The district court held a hearing on the government's appeal from the magistrate's release order. The court found that respondent was detain-

---

[3] The magistrate in Las Cruces was a part-time magistrate and was unavailable between Monday, February 13, and Thursday, February 16. See J.A. 43.

[4] Respondent asserts (Br. [illegible] n.4) that we are wrong in identifying the February 16 hearing as the one at which the government first sought detention. The government, however, specifically requested the February 16 hearing for the purpose of seeking a detention order. Although the "first appearance" requirement is normally triggered by a formal motion for detention, in the circumstances of this case the request for a detention hearing was a sufficiently clear indication of the government's intentions that the February 16 hearing may be regarded as respondent's "first appearance before a judicial officer" following the government's request for detention.

able under the standards set forth in 18 U.S.C. 3142(e) but that he had to be released because the detention proceedings had not complied with the time limits in the "first appearance" provision of the Bail Reform Act, 18 U.S.C. 3142(f). Pet. App. 22a-24a, 30a-31a.

This chronology shows not a callous disregard for the defendant's rights, as respondent suggests, but an effort on the part of the government and the court to proceed expeditiously under unusual circumstances. The government brought respondent before a judicial officer on the day of his arrest in Chicago, where he waived his right to an immediate detention hearing. Respondent was returned to New Mexico pursuant to court order that night, and on the morning of the next working day the government requested that the New Mexico magistrate schedule a detention hearing on the next available court day; the magistrate then ordered a continuance of the detention hearing for two working days, without objection by respondent to the continuance. The hearing before the magistrate and the appeal to the district court were then completed within two days.

This chronology, and the debate between the parties about the proper characterization of various events and motions, demonstrates how difficult it can be to interpret and apply the time requirements of Section 3142(f). If respondent validly waived his right to an immediate detention hearing in Chicago, or if respondent's "first appearance before the judicial officer" for purposes of the Act did not occur until February 16 in New Mexico, the Act may not have been violated at all (since the detention hearing was held only two working days later, on February 21). Although the district court and the court of appeals ruled against the government on both of those points, there is at least a substantial argument, based on case law in

other circuits, that under the circumstances of this case there was no violation of the time limits of Section 3142(f) at all.[5]

We make these observations for two reasons. First, while we have not asked this Court to review the court of appeals' conclusion that the "first appearance" requirement was violated, we submit that a fair reading of the record shows, at a minimum, that the violation was not flagrant. Second, the debate in this case about the proper characterization of various proceedings is exactly the kind of dispute that courts have been struggling with and will

[5] Respondent's waiver of his right to an immediate detention hearing in Chicago would have been sufficient in either the Second or Fourth Circuits. See *United States* v. *Coonan*, 826 F.2d 1180, 1184 (2d Cir. 1987); *United States* v. *Clark*, 865 F.2d 1433, 1436-1437 (4th Cir. 1989) (en banc). Moreover, in the Second, Seventh, and Eighth Circuits, the transfer hearing in Chicago would not have been regarded as respondent's "first appearance before the judicial officer," either because it did not occur after a motion for detention, see *United States* v. *Maull*, 773 F.2d 1479, 1483 (8th Cir. 1985) (en banc), or because a transfer hearing is not regarded as a "first appearance" for purpose of Section 3142(f), see *United States* v. *Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986); *United States* v. *Dominguez*, 783 F.2d 702, 704-705 (7th Cir. 1986). The continuance granted, without objection, from February 16 to February 21 was acquiesced in by the government and respondent (although respondent preserved an objection to the government's failure to move for detention in Chicago, J.A. 23). Respondent's failure to object to the continuance should have been regarded as an acquiescence in a three- or five-day continuance. See *United States* v. *Madruga*, 810 F.2d 1010, 1014 (11th Cir. 1987) ("Unless a defendant objects to the proposed hearing date on the stated ground that the assigned date exceeds the three-day maximum, he is deemed to acquiesce in up to a five-day continuance."); *United States* v. *Malekzadeh*, 789 F.2d 850, 851 (11th Cir. 1986). And even if the three-day continuance period is applicable, rather than the five-day continuance period (see 18 U.S.C. 3142(f)), the continuance granted on February 16 was for only two days if weekends and holidays are excluded, as the Second Circuit has held they should be. See *United States* v. *Melendez-Carrion*, 790 F.2d at 991.

continue to struggle with, if a technical violation of the Section 3142(f) time limitations requires automatic release on conditions.[6] The time-consuming, and ultimately unproductive, debates among the courts of appeals over what constitutes a "first appearance," whether the right to a detention hearing can be waived, when a judicial officer may grant a continuance *sua sponte*, and how weekends and holidays should be counted, see Pet. 9-10, are an unfortunate by-product of a rule in which a timing error automatically defeats the government's right to detain the defendant, no matter how minor the error or how clear the case for detention may be. And, because detention proceedings are invariably conducted during the often-chaotic period immediately following a defendant's arrest, it is likely that minor errors in the application of the time limits of Section 3142(f) will continue to be made in a significant number of cases, despite the best efforts of agents, prosecutors, and magistrates.

2. Respondent's legal argument is based on language from 18 U.S.C. 3142(e), which states that detention can be ordered only "after a hearing pursuant to the provisions of subsection (f) of this section." Respondent argues that if there is any deviation from the time limits set forth in

[6] Respondent is critical of our use of the term "automatic release," since a defendant who is not detained may nonetheless be subjected to a variety of release conditions. We use the term "automatic release" not to suggest that the defendant's release is unconditional, but because it accurately describes the judicial officer's obligation under the statute when detention is not available. If the judicial officer does not order detention, but decides instead to impose a financial condition, he may not impose a condition that the defendant cannot meet. 18 U.S.C. 3142(c)(2). Thus, if the defendant is not detained, bail must be set at a level that guarantees that the defendant will be able to obtain his release.

Section 3142(f), the hearing has not been conducted "pursuant to the provisions of subsection (f)," and detention therefore may not be ordered.

Respondent's argument proves too much. If a deviation from the time limitations in Section 3142(f) renders the detention hearing not "a hearing pursuant to the provisions of subsection (f)," the same would logically be true of other deviations from the hearing procedures set forth in Section 3142(f). Thus, the court's failure to permit the defendant to testify, or its failure to permit him to cross-examine a witness at the hearing, would not be subject to harmless error analysis and, in fact, would not even permit the court to hold a new, error-free detention hearing.[7]

Understandably, respondent backs away from the implications of his position with respect to procedural defects other than timeliness, suggesting that other errors may be subject to harmless error analysis. See Br. 2[illegible]. But petitioner does not adequately explain how that concession is consistent with his "plain meaning" interpretation of Section 3142(e). If a failure to follow "the provisions of subsection (f)" with respect to timeliness means that a condition precedent for detention has not been satisfied, it is hard to understand why a failure to comply with other provisions of Section 3142(f) would not have the same effect. It is not enough to say, as respondent does (Br. 23-24), that a hearing that violates some of the procedural requirements of Section 3142(f) may still be "fair," but that a hearing that is not held "immediately upon the person's first appearance before the judicial officer" cannot be "prompt." Just as a minor procedural deviation may

[7] Under respondent's theory, of course, a new hearing could not be held in that situation, because it would be barred by the time limitations of Section 3142(f).

not render a hearing materially less fair, a minor delay in holding the hearing does not render it significantly less prompt.

Many statutes and rules dictate the procedures that are to be followed in particular proceedings – often in mandatory terms. But while the failure to comply with those procedural requirements may be error, that does not necessarily mean that the proceeding in question is void or that the party seeking to vindicate a right through that proceeding must permanently be denied relief. For example, Rule 6(d), Fed. R. Crim. P., states that, with certain exceptions, no person other than "the witness under examination" may be present while a grand jury is in session. Even though that rule is stated in mandatory terms, the Court has held that it is subject to harmless error analysis. *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369, 2378 (1988). Similarly, Rule 43(a) states in mandatory terms that, except in specified circumstances, the defendant "shall be present * * * at every stage of the trial." Nonetheless, this Court has held that violations of Rule 43 are subject to the harmless error rule. *Rogers* v. *United States*, 422 U.S. 35 (1975). Finally, Rule 32(a), Fed. R. Crim. P., requires that sentence be imposed without "unreasonable delay." Nonetheless, even if a defendant shows that the delay in sentencing was unreasonable, he is not entitled to relief for unreasonable delay unless he can show that the delay prejudiced him. *United States* v. *Campbell*, 531 F.2d 1333 (5th Cir. 1976), cert. denied, 434 U.S. 851 (1977); *United States* v. *James*, 459 F.2d 443 (5th Cir. 1972).

3. Respondent argues that harmless error principles are not applicable to this case for several reasons, but those reasons do not withstand analysis. Contrary to respondent's assertion (Br. 2[illegible]), Rule 52(a), Fed. R. Crim. P., applies to trial level proceedings and is not simply a standard for

appellate review. See *Bank of Nova Scotia*, 108 S. Ct. at 2374 (district court may not disregard Rule 52(a) and dismiss indictment because of misconduct before the grand jury if the misconduct did not prejudice the defendant). If the error in this case was not one that "affect[ed] substantial rights," the district court should have disregarded it. The implication of respondent's interpretation of Rule 52(a), as applied to other kinds of errors, is that a district court would be required routinely to grant a new trial upon discovering any error at all in the proceedings, but that the reviewing court, applying harmless error principles, would be required to reverse the new trial order whenever it found the error to be harmless. Criminal litigation has never functioned that way and, we hope, never will.

Respondent seeks to distinguish the harmless error cases cited at page 16, note 7, of our opening brief on the ground that "those cases deal with the post-conviction review of a constitutional violation of the defendant's rights" (Br. 28 n.10), rather than a statutory violation, as in this case. It is simply not the case, however, that constitutional errors are subject to harmless error analysis and statutory errors are not. See *United States* v. *Lane*, 474 U.S. 438, 446 n.9 (1986). Indeed, this Court's cases suggest that harmless error principles apply more broadly to claims of statutory error than to claims of constitutional error. See *Chapman* v. *California*, 386 U.S. 18 (1967) (constitutional errors are subject to stringent "beyond a reasonable doubt" test for harmless error); *Bank of Nova Scotia*, 108 S. Ct. at 2374-2375 (nonconstitutional errors are harmless unless the court concludes, from the record as a whole, that the error may have had a "substantial influence" on the outcome of the proceeding).

Respondent contends that to apply a harmless error analysis to violations of the "first appearance" provision of

Section 3142(f) would render that provision a dead letter. That argument assumes that prosecutors and magistrates would willfully ignore statutory mandates. We doubt that magistrates and prosecutors will behave in that fashion. Even assuming bad faith on the part of court officers, the district courts and courts of appeals have within their power sanctions that can have a much more direct effect on magistrates and prosecutors who willfully disregard the statutory requirements. Disciplinary actions against officials who ignore the statutory time limitations are likely to have a far greater impact, especially on magistrates, than legal rules that simply require that detention be denied if the magistrate does not hold a timely detention hearing.

The costs imposed by a rule requiring automatic release for any violation of Section 3142(f)'s time limits, we submit, far outweigh the costs imposed by a harmless error rule. A rule of automatic release will mean that defendants who have been judicially determined to be dangerous or to be flight risks will have to be released; it can confidently be predicted that many of them, like respondent in this case, will flee or commit other crimes. In addition, a rule of automatic release will give defendants, especially defendants who are very likely to be detained, no incentive to avoid a violation of the time limitations. In this case, there likely would have been no violation at all if respondent had refused to waive his right to a detention hearing in Chicago, or if he had insisted on a detention hearing earlier than February 16, or if he had opposed the continuance of the hearing until February 21. But respondent voiced no objection at any of those points, and, if the court of appeals' judgment is affirmed, his silence will be rewarded. The per se rule that respondent advocates thus provides a huge incentive to "sandbagging" by defendants whose only hope of release is that the magistrate or the prosecutor will

make a technical timing error in the proceedings leading to the detention order.

4. Respondent suggests (Br. [illegible]) that "Rule 4(a) of the Federal Rules of Appellate Procedure provides a useful analogy," and asserts that the Bail Reform Act's provisions governing the timing of a hearing should be treated, like Rule 4's time limits, as mandatory and jurisdictional. The comparison is inapt. This Court has long recognized that the time limits imposed by this rule (and predecessor statutes) must be strictly observed to assure the finality of judgments. *E.g.*, *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978). The Court has stated:

> The purpose of the rule is clear: It is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the applicant's demands. Any other construction of the statute would defeat its purpose."

Ibid., quoting *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412, 415 (1943). The Bail Reform Act's provisions governing the timing of a detention hearing serve an entirely different purpose. As respondent recognizes (Br. [illegible]), they are intended to protect the arrestee's and the government's interest in obtaining a prompt, but reasoned, determination of the defendant's eligibility for pretrial release. A rule that requires automatic release of the defendant for any violation of the time limits would subvert, rather than advance, that goal.

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1990